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A TREATISE ON THE LAW

RELATING TO THE

INSURANCE OF FREIGHT

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A TREATISE ON THE LAW

RELATING TO THE

INSURANCE OF FREIGHT

WITHDRAWN
L. A. CO. L. L.

BY

GEORGE MAITLAND LAZARUS

M.A., LL.B.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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TO

DAVID CALDER LECK

OF THE MIDDLE TEMPLE

ONE OF HIS MAJESTY'S COUNSEL

735198

UNIVERSITY OF CALIFORNIA

PREFACE

A CENTURY ago—according to a report in 2 Dow's Report, page 479—"those who had been most concerned in settling what was the law on the subject of marine insurance had taken great credit to themselves for its certainty, and text-writers had boasted of how little uncertainty there was in this branch of law," but as was pointed out by Lord Eldon, "it might perhaps be found, when the matter came to be examined with the proper degree of impartiality, that there was full as much uncertainty on this subject as in any other branch of the law." Lord Eldon's criticism was fully justified. Even at the present time there are few subjects which present to the lawyer so many difficulties as the law of marine insurance, and particularly that branch of the law of marine insurance which relates to the insurance of freight.

In this volume I have endeavoured to ascertain and to state the principles of law which govern the insurance of freight. That the conclusions at which I have arrived will in every case be accepted, I do not expect, but I hope that by discussing the difficulties which have arisen, and by collecting the authorities which bear upon them, I may lighten the task of those who in the future have to consider this branch of the law.

I am greatly indebted to my friend Mr. D. C. Leck, K.C., who was good enough to read through the whole of my manuscript, and to give me the benefit of his advice and assistance.

G. M. L.

5, PAPER BUILDINGS,
June, 1915.

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LAW RELATING TO THE INSURANCE OF FREIGHT

CHAPTER I.

Freight as the Subject of Insurance.

Ships are built for the purpose of earning money by the carriage of goods. Merchants require ships to carry their merchandise. For this service they are willing to pay, and the remuneration thus payable is termed freight.

In days gone by, when ships were small and commerce but slightly developed, shipowners were willing to send their vessels to a port and take the risk of finding there merchants who would provide a cargo. Merchants, too, who had no definite engagements to fulfil and merely sought a favourable market for their wares, were willing to await the arrival of a ship. But the day of the seeking ship is passing away. The enormous growth in the size of vessels, and the consequent increase in their carrying capacity and in the cost of their maintenance has made it imperative for the shipowner to be assured of employment for his vessel. On the other hand, the development and organization of international commerce has made it imperative for the merchant to be assured of a vessel to carry his goods. Neither side can afford to trust to chance. Definite employment and definite engagements are essential.

The conditions of employment differ widely, but speaking generally shipowners offer the services of their vessels in two ways. Either the ship is put up for a defined voyage as a general ship and takes the goods of any person willing to ship in her, or the shipowner seeks for some one who will employ the vessel upon some voyage or during some period of time, for purposes and upon terms to be agreed with him. On those routes where trade is regular and constant,

ships are run as general ships at more or less regular intervals. The shipowner is able to gauge with comparative accuracy the amount of tonnage that will be required, and can rely on obtaining ample cargoes for his vessels. The merchant under normal circumstances experiences no difficulty in obtaining space, and if he wants to ensure that his goods will not be shut out, he can definitely engage in advance room for the goods he proposes to ship. Except in those cases where ships are run as general ships in connection with a regular line, the shipowner usually prefers to leave to others the risk and task of collecting together a cargo. He charters his ship, generally the whole ship, but the charterparty may relate to a smaller portion of the ship's carrying capacity, it may be to a merchant who proposes to load his own goods; it may be to a person who hires the ship for a specified sum or rate to make a particular voyage, intending himself to put her up as a general ship, and hoping to make a profit by the difference between the rate of freight he pays to the shipowner and the rate he receives from the merchant; it may be to a charterer, who hires the vessel for a voyage or succession of voyages or for a period of time and proposes to work her for his own profit as the owner.

In whatever way a vessel may be employed, the remuneration payable is described comprehensively as freight. In the strict significance of the term freight is the remuneration payable for the carriage and safe delivery of goods. In practice it has a more extended application and designates, in addition to the remuneration payable for the carriage and delivery of goods that have been put on board a vessel, the remuneration agreed to be paid under a contract of affreightment relating to the use of a vessel or of space in a vessel, or to the carriage of goods in a vessel which the shipowner undertakes to provide.

In the case of a general ship the freight will be usually remuneration for the carriage of goods. In those cases, however, where a merchant engages in advance space for the goods he proposes to ship, the shipowner may be entitled to remuneration whether any use is made of the space or not. If the space is utilised and the goods are put on board, the shipowner will receive his remuneration in the form of the freight payable in respect of those goods. On the other hand, if the goods are not put on board and the space

is not utilised, the shipowner may be entitled to recover an equivalent amount as being the value of the space which the merchant was entitled to use (*a*). In the case of a chartered vessel the remuneration payable to the shipowner is primarily payable for the right to make use of a vessel or of space in a vessel or to have goods carried in a vessel. The remuneration may take the form of a lump sum payment, but by the terms of most charter parties the charterer undertakes to load goods for the carriage of which remuneration will be payable. The right of the shipowner to remuneration is independent of the amount of cargo which may be shipped. If the full contemplated cargo is put on board, the shipowner will look to that cargo for the payment of his freight. If, however, the cargo is not loaded, then the shipowner will be entitled, subject to his duty to minimise the damages as much as possible, to receive from the charterer the difference between the freight which is payable in respect of the cargo actually shipped and the freight which would have been payable if the agreed cargo had been put on board.

In the case of a chartered ship freight may be of a twofold character, namely, the remuneration agreed to be paid under the contract of affreightment for the right to make use of a vessel or of space in a vessel or to have goods carried in a vessel, and the remuneration payable under bills of lading for the carriage of goods that have been put on board. In some cases the shipowner may agree to accept the remuneration payable for the carriage of the goods put on board in satisfaction of the remuneration agreed to be paid under the contract. In other cases he has no interest in the remuneration payable in respect of the carriage of the goods. He has transferred to the charterer the right to make use of the vessel. For this he is entitled to receive remuneration from the charterer, but with the benefit which may be derived by the charterer from the use of the vessel he has no concern. In such cases the two freights are totally distinct, (*b*) and in the complicated transactions which arise, there may be several distinct freights subsisting at the same time in respect of the same vessel.

(*a*) *See* per KAY, L.J., in *Aitken Lilburn & Co.* v. *Ernsthausen & Co.* (1894), 1 Q. B., p. 777.

(*b*) *See* per Lord LINDLEY in *Williams* v. *Canton Insurance Office* (1901), A. C., p. 472.

In the previous outline freight has been treated as a remuneration payable by some one in return for the services of the ship, but in insurance law it is not so limited. A shipowner (and in some cases the following remarks will apply also to a charterer) may employ his ship to carry his own goods. Freight will not be directly payable, but the shipowner will receive in the increased value of the goods due to the carriage a benefit equivalent to the benefit he would have received if he had been carrying the goods of another. Where goods are shipped on board of a vessel on behalf of the owners of the vessel, "they derive an additional value by being carried; and although no freight is reserved by the bill of lading, yet when the goods arrive, the shipowner receives in the increased value of the goods something which to him represents precisely the same thing as if he had been carrying somebody else's goods, and he had been paid a definite sum for the carriage of them. There is no doubt that that is in the abstract a state of things in which the ship is earning something," (*c*) and this, "though not strictly freight, is so like it that it has been held that it may be insured under that name." (*d*)

This was decided in the case of *Flint* v. *Flemyng*, (*e*) where Lord TENTERDEN said:

"If it be a necessary ingredient in the composition of freight that there should be a money compensation paid by one person to another, the benefit accruing to a shipowner from using his own ship to carry his own goods is not freight. But if the term freight, as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy."

(*c*) Per Lord PENZANCE in *Keith* v. *Burrows* (1877), L. R. 2 A. C., p. 650.
(*d*) Per HANNEN, J., in the *Thyatira* (1883), 8 P. D., p. 157.
(*e*) (1830), 1 B. & Ad. 45; 8 L. J. (o.s.) K. B. 350; Ll. & Wels. 257.

Nine years later the point was again raised in the case of *Devaux* v. *I'Anson* (*f*), but the Court considered "the question to be set at rest by the decision of the Court of King's Bench in the case of *Flint* v. *Flemyng*, and held it to be now established law, that the assured under an insurance upon freight may recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured."

Flint v. *Flemyng* (1830), 1 B. & Ad. 45; Ll. & Wels. 257; 8 L. J. (o. s.) K. B. 350; 35 R. R. 205,

was an action on an open policy on freight by the ship *Hope* at and from Madras to London.

Facts.—The vessel on arrival at Madras proceeded to discharge her outward cargo and to prepare to receive her homeward cargo. Before any of the homeward cargo was loaded, the vessel was lost. The captain had bought 25 tons of red wood on account of the plaintiff, who was the owner of the vessel. The agents of the plaintiff had bought for him by his directions 122 tons of saltpetre, and a Mr. Webster had engaged to ship about 90 tons of light goods. There was no written contract as to these last-mentioned goods, and the captain expressed the opinion that Mr. Webster was not bound to ship them except in honour.

Held that the assured could recover in respect of the red wood and the saltpetre, but in respect of the light goods it was referred to a barrister to ascertain whether there was any binding contract for their shipment.

Devaux v. *I'Anson* (1839), 5 Bing. N. C. 519; 7 Scott, 807; 8 L. J. C. P. 284; 2 Arn. 82; 3 Jur. 678; 30 R. R. 786,

was an action on a policy of insurance on freight valued at £1000 by the ship *La France*, at and from Calcutta or any port on the Coromandel coast to any port or ports in Bourbon.

(*f*) (1839), 5 Bing. N. C. 519; 7 Scott, 807; 2 Arn. 82; 3 Jur. 678; 8 L. J. C. P. 284; 30 R. R. 786.

FACTS.—The vessel arrived at Coringa, a port on the Coromandel coast, and put into dock for repairs. After the repairs had been completed, and while preparations were being made for bringing the vessel out of dock, she was seriously damaged, and had to be broken up and sold. The plaintiff, the owner of the vessel, had purchased on his own account a quantity of goods for the return cargo, and these goods were lying ready for shipment, but owing to the accident they had to be brought back in another vessel.

Held that the plaintiff could recover for the loss of freight.

The term freight, then, as used in insurance law may be described as the benefit derivable from the use or employment of a ship or a part thereof by the shipowner or other person entitled to such use or employment; it does not include passage-money. According to the Marine Insurance Act (*g*) "the term freight includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage-money." (*h*)

Except in a case where a shipowner uses his vessel to carry his own goods, freight results from some contract. The contract defines the amount of the remuneration, and the conditions upon which it is payable. The assured wants to be indemnified against the loss of the remuneration to which he may be entitled under the contract by the operation of any of the perils insured against. It becomes necessary, therefore, in every case to consider the terms of the contract in order to ascertain the extent to which the right to freight has been affected. A loss of goods may entail a loss of freight, but by the terms of the contract it may be that freight is nevertheless payable. Similarly an accident to a vessel may result in a loss of freight, but it does not necessarily do so. "An insurance on freight

(*g*) Sect. 90, and Rules for Construction of Policy, rule 16.

(*h*) In *Allison* v. *Bristol Marine Insurance Co.* (1873), 29 L. T., p. 40, BOVILL, C.J., defined freight as "the benefit derived from the employment of the ship." According to Phillips, sect. 327, "In insurance the term freight signifies the earnings or profits derived by the shipowner or the hirer of the ship from the use of it himself or by letting it to others to be used, or by carrying goods for others."

must necessarily have reference to some contract of affreightment under which, during the time covered by that policy, freight might be earned: and to ascertain what the freight insured was, in case of loss, the actual contract of affreightment must necessarily be regarded." (*i*) "As soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charterparty a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another such a temporary disablement might deprive the shipowner of all claims for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss." (*k*)

Contracts of affreightment relating to the employment of a vessel vary widely in character and in their provisions. They may operate as a demise or lease of the ship, or they may merely give the right to the use of a vessel or of space in a vessel or to have goods carried in a vessel for a particular voyage or series of voyages or period of time.

Such contracts of affreightment are usually embodied in a document called a charterparty, (*l*) but no particular form of document

(*i*) Per Lord SELBORNE in *Inman S.S. Co.* v. *Bischoff* (1882), L. R. 7 A. C., p. 672.

(*k*) *Ibid.*, per Lord BLACKBURN, at p. 678.

(*l*) A charterparty has been defined as an "instrument in writing between a merchant and a shipowner for the hire of an entire vessel" (Stephens' Commentaries, 16th ed., vol. 2, p. 245); or again, "as a contract of affreightment by which an entire vessel or some principal part thereof is let" (Abbott on Shipping, 14th ed., pp. 155, 328; MacLachlan on Shipping, 5th ed., p. 374). Charterparties are, however, frequently met with which relate to only a portion of the vessel's carrying capacity (*vide Potter* v. *New Zealand Shipping Co.* (1895), 1 Com. Cas. 114). In *Nelson* v. *Nelson Lines*, [1908] A. C. 108, the defendants agreed to run a regular line of vessels between the River Plate and the United Kingdom, and the plaintiffs agreed to ship in each vessel so much frozen meat as would fill certain insulated chambers. "The contract which must regulate this controversy is called a charterparty. It is an agreement by shipowners to supply and by charterers to fill a part of each vessel. The rest of the space was to be filled with cargo of others" (per Lord LOREBURN, at p. 110).

is required. "It makes no difference whether the contract was by charterparty or otherwise, it is sufficient that there was a contract. The word charterparty frequently misleads, and is apt to convey the idea of something extraordinary; but there is no magic in the word charterparty, and an agreement of any sort is equally valid." (*m*) The agreement may be under seal, it may be contained in correspondence (*n*) or in entries in a notebook, (*o*) or it may be merely verbal. (*p*) As has been already stated, by the terms of most charterparties the charterer undertakes to fill the vessel with goods for the carriage of which remuneration will be payable. In respect of these goods bills of lading will be issued, and under these bills of lading the rights and liabilities of the shipowner may be different from his rights and liabilities under the charterparty. But in so far as the freight insured is the freight payable under the charterparty, the rights and liabilities of the shipowner as defined by that document alone need be considered, for the shipowner cannot by voluntarily departing from its terms increase the liability of the underwriter. (*q*)

Williams & Company & Another v. *The Canton Insurance Office, Limited* (1901), A. C. 462; 70 L. J. K. B. 962; 85 L. T. 317; 6 Com. Cas. 256.

was an action on a policy of insurance on freight chartered or as if chartered, on board or not on board valued at £3000.

FACTS.—Messrs. Williams & Co., who were the owners of the S.S. *Ramleh*, chartered the vessel for a voyage from Buenos Ayres to Liverpool at a lump freight of £3000 payable on the right and true delivery of the cargo. The charterparty provided that the charterer's liability was to cease upon shipment of the cargo. A full cargo belonging to numerous shippers was put on board and the master signed bills of lading by which the goods

(*m*) Per BURROUGH, J., in *Truscott* v. *Christie* (1820), 5 Moore, 33; 2 Br. & B. 320; 25 R. R. 446; see also *Patrick* v. *Eames* (1813), 3 Camp. 442.

(*n*) *Parke* v. *Hebson*, cited in *Truscott* v. *Christie*, see above.

(*o*) *Warre* v. *Miller* (1825), 4 B. & C. 538; 7 D. & R. 1; 1 C. & P. 237; 4 L. J. (o. s.) K. B. 8; 28 R. R. 382.

(*p*) *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; Ll. & Wels. 257; 8 L. J. (o. s.) K. B. 350; 35 R. R. 205; *Lidgett* v. *Williams* (1845), 4 Hare, p. 462.

(*q*) *See* per Lord SELBORNE in *Inman S.S. Co.* v. *Bischoff* (1882), L. R. 7 A. C. p. 675.

mentioned in each bill of lading were made deliverable upon payment of the bill of lading freight in respect of those goods. In the course of the voyage the vessel ran aground, and a portion of the cargo was lost by jettison, but the vessel subsequently arrived at Liverpool with the balance of the cargo, but owing to the jettison the bill of lading freight payable on the cargo delivered was less than the chartered freight by £614.

Held that the plaintiffs could not recover, as the chartered freight was earned so far as the charter itself was concerned, and if the whole chartered freight was not realised, that was in consequence of the form in which the bills of lading were taken.

Freight may be made payable in many ways. It may be a lump sum freight of a definite amount, or a lump sum freight based upon the capacity of the vessel, or the measure, weight, or character of the goods to be carried (*r*). It may be payable at a certain rate and that rate may be the current rate, (*s*) or a nominal rate, (*t*) or a rate which varies with the nature of the goods shipped. (*u*) It may be subject to deductions in respect of loss or damage to the goods. (*x*) It may be payable in kind, (*y*) but usually is payable in money. It is not even necessary that a rate of freight should have been agreed. In such a case unless it is proved that the goods were to be carried gratuitously, a reasonable rate of freight will be payable, and this will usually be calculated at the ordinary rate ruling at the time when the shipment was made. (*z*)

Freight is usually due and payable when the services in respect

(*r*) Cf. *Red R. S.S. Co.* v. *Allatini* (1909), 14 Com. Cas. 82, 303; 15 Com., Cas. 290.

(*s*) Cf. *Davidson* v. *Willasey* (1813), 1 M. & S. 313.

(*t*) *Turner* v. *Trustees of Liverpool Docks* (1851), 6 Ex. 543; *Brown* v. *North* (1852), 8 Ex. 1; *Keith* v. *Burrows* (1877), L. R. 2 A. C. 636; *Swan* v. *Barber* 1879), L. R. 5 Ex. D. 130.

(*u*) Cf. *Southampton Steam Colliery Co.* v. *Clark* (1870), L. R. 6 Ex. 53.

(*x*) *Griffiths* v. *Bramley Moore* (1878), 4 Q. B. D. 70; *S.S. Garston* v. *Hickie Borman & Co.* (1886), 18 Q. B. D. 17.

(*y*) *Atty* v. *Lindo* (1805), 1 B. & P. N. R. 236; *Wiggin* v. *Mercantile Assurance Co.* (1828), 7 Pick. 271 (Am.).

(*z*) *Miller* v. *Woodfall* (1857), 8 E. & B. 493; *Mitcheson* v. *Nicol* (1852), 7 Exch. 929; *Gumm* v. *Tyrie* (1864), 4 B. & S. 680; 6 B. & S. 298; *Ursula Bright S.S. Co.* v. *Ripley* (1903), 8 Com. Cas. 171.

of which it is to be paid have been completed, but it may be made payable in advance. At one time the view was held that a payment made due in advance in this way could not properly be called freight, and could not be recovered under the name of freight. (*a*) "Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery." (*b*) A payment made due when goods were put on board or at some other time, whether the goods were safely delivered or not, was regarded as a payment "for taking the goods on board and undertaking to carry and not for carrying them." (*c*) "There was a time in the history of the law after the judgment in *Kirchner* v. *Venus* (*d*) when it was supposed that advanced freight and freight were different, that the former was a loan or a sum payable when the goods were put on board in consideration of their being received on board. So great an authority as BLACKBURN, J., entertained that view, and entertained it at the time when he delivered his opinion in *Allison* v. *Bristol Marine Insurance Co.* The opinions of the law lords in that case make it clear that that view was incorrect, and that 'freight,' whether used in respect of advanced freight or otherwise, always has the same meaning. It may be stipulated that it shall be payable on delivery of the goods or that a part shall be payable in advance, but every payment is a payment of the same freight. . . . The practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment, but they still remain parts of the one whole." (*e*)

In insurance law no distinction is drawn between freight payable on delivery of goods and freight payable in advance, except in so far as it affects the question of insurable interest. Where freight is paid in advance, it may be in the nature of a loan repayable by the shipowner, if the services in respect of which it is paid are not performed. In such cases the shipowner remains subject to the risk of losing the freight through failure to perform the agreed services.

(*a*) *Blakey* v. *Dixon* (1800), 2 B. & P. 321; see also *Mashiter* v. *Buller* (1807), 1 Camp. 84.

(*b*) Per BLACKBURN, J., in *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 A. C., p. 228.

(*c*) *Ibid.*, per BLACKBURN, J., at p. 229; see also *Winter* v. *Haldimand* (1831), 2 B. & Ad., p. 659.

(*d*) (1859), 12 Moo. P. C. 361.

(*e*) Per VAUGHAN WILLIAMS, L.J., in *Weir* v. *Girvin* (1900), 1 Q. B., at p. 52.

On the other hand, the payment may be an out and out payment in advance, which is intended to be independent of the performance of any services, and which cannot be recovered. In such cases the person who has made the payment runs the risk of losing the benefit of the payment. The freight has been paid, but it has not been earned and the person interested in it being earned is not the shipowner, but the person who has paid it. He is in a position similar to that of a purchaser of the freight, (*f*) and his interest, as will be shown in a later chapter, can be insured as freight.

(*f*) Per BYLES, J., in *Frayes* v. *Worms* (1865), 19 C. B. (N. S.), at p. 177.

CHAPTER II.

Insurable Interests in Freight.

It has long been an established principle of English law that freight is a lawful subject of marine insurance. "It would, indeed, be extraordinary if freight could not be made the subject of protection by an instrument which had its origin in commerce, and was introduced for the very purpose of giving security to mercantile transactions; it is a solid substantial interest ascertained by contract, and arising out of labour and capital employed for the purposes of commerce." (*a*)

Freight is the benefit derived from the employment of a vessel. It follows, therefore, that before freight can come into existence, or before an insurable interest in freight can arise, employment must have been found for the vessel. "The underwriter does not insure that the ship shall have freight" (*b*), but that the earning of the freight derivable from the employment, which may be obtained for the vessel, shall not be prevented by any of the perils insured against. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight." (*c*)

It has been urged by Mr. Phillips (*d*) that this view is a narrow one, and that an insurance on freight should cover the interest of a shipowner who is sending his vessel to a port to take in cargo on his own account, which he has a reasonable expectation of obtaining and sufficient means to purchase. He therefore suggests as a modification of the doctrine that "where the vessel has sailed for an

(*a*) Per Chambre, J., in *Lucena* v. *Cranford* (1802), 3 B. & P., p. 102.
(*b*) Per Lord Ellenborough in *Forbes* v. *Cowie* (1808), 1 Camp., p. 520.
(*c*) Per Lord Ellenborough in *Forbes* v. *Aspinall* (1811), 13 East, p. 326.
(*d*) Phillips on Insurance, 3rd ed., sect. 333.

intended port of loading, for the mere purpose of there taking a cargo for a subsequent passage, to procure which the owner has funds on board or reliable credit, and it appears that such a cargo can undoubtedly be there procured, the interest in freight, for the entire voyage homeward, has accrued."

This doctrine would not be limited to the case of a shipowner who was proposing to load his ship with a cargo on his own account, but would apply with equal force to the case of a shipowner sending his vessel to a port for the purpose of obtaining employment from other persons. It may be that in many such cases the prospects of eventually earning a freight will be better than the prospects of earning the freight contemplated by a contract of affreightment, for the charterer may become unable to fulfil his obligations. (*e*) There is, however, this fundamental difference, that in the one case employment has been obtained for the vessel, in the other case there is only an expectation of obtaining employment. "When there is an insurance upon freight, so long as the matter remains merely contingent, so long as the shipowners have only a good hope of getting freight, no freight is in existence; and if the ship is lost, there would be no loss of freight, inasmuch as the freight had never come into existence, and all that the shipowners have lost is the hope of earning the freight." (*f*)

Is it sufficient, in order to create an insurable interest in freight, that employment from which freight will result has been obtained? Early decided cases imposed upon the ordinary insurance on freight a limitation to the effect that the assured must have an "inchoate right to the freight," an expression which has given rise to much difficulty and confusion, as it has been used as referring both to the inception of an insurable interest and to the inception of the risk. "The question whether the assured on freight has at the time of the

(*e*) As in *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, where the charterer became insolvent, but after the freight had been lost by perils insured against.

(*f*) Per BLACKBURN, J., in *Barber* v. *Fleming* (1869), L. R. 5 Q. B., p. 70. This expectation of obtaining freight may, perhaps, be insured by a policy in which the interest is properly described. "It seems to me clear that a shipowner has an interest in the use of his ship, and that he may insure against the loss which he may undoubtedly suffer from being deprived of its use by perils of the sea or other causes" per WALTON, J., in *Manchester Liners* v. *British & Foreign Marine Insurance Co.* (1901), 7 Com. Cas., p. 33; see also per MATHEW, J., in *Lawther* v. *Black* (1900), 6 Com. Cas., p. 8.

loss an insurable interest in the freight is one which is often treated in the cases and text-books in a way which causes a difficulty in distinguishing it from the question of the duration of the risk under a policy on freight. Yet these questions are different ones. Whether there be an insurable interest is a matter independent of the policy. In the absence of an insurable interest, the assured cannot maintain an action, however the policy be worded. If, on the other hand, he had an insurable interest, the question arises whether the loss occurred within the limits of place or time fixed by the policy." (*g*) In order to understand how this difficulty and confusion arose, it is necessary to trace the origin of the doctrine of the inchoate right to freight, and to follow its development.

"An ordinary insurance upon freight is a contract of indemnity during the adventure in which the freight is to be earned." (*h*) This conception of an insurance on freight has been accepted without challenge, and it is therefore difficult to find any definite authorities in support of it, but there are in the cases many dicta to the effect that the liability of the underwriter under the policy depends upon whether the freight-earning voyage has commenced. "*Where freight is in the course of being earned,* the underwriter upon freight is liable for any loss from a peril within the scope of the policy, which prevents its being earned." (*i*)

"In the case of a freight policy, where the assured has entered into a contract for freight, under which, except for the wrongful act of the party with whom he has contracted, he would be in a condition to earn his freight if the voyage were not stopped by a peril insured against; there *if the voyage has commenced* in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount." (*k*)

"The assurers assure the sum mentioned on freight that shall once commence to be earned. . . . Freight must commence to be earned before the policy can attach." (*l*)

(*g*) Arnould, sect. 265.

(*h*) Per WILLES, J., in *Rankin* v. *Potter* (1868), L. R. 3 C. P., p. 567.

(*i*) Per Lord ELLENBOROUGH in *Taylor* v. *Wilson* (1812), 15 East, p. 330.

(*k*) Per LE BLANC, J., in *Davidson* v. *Willasey* (1813), 1 M. & S., p. 317.

(*l*) Per SWIFT, C.J., in *Riley* v. *Hartford Insurance Co.* (1817), 2 Conn., p. 371 (Am.).

How this conception originated is not clear, but it was in all probability influenced by the fact that insurances on freight were effected by means of voyage policies, and by the peculiar nature and incidents of freight. When an insurance on freight for a voyage was effected, it was assumed that the shipowner would be sending his vessel on that voyage for the purpose of earning freight, and it was the freight to be earned on that voyage which, it was considered, was intended to be covered by the policy. As was said by Lord MANSFIELD, "the intention of the parties to the policy was to insure the object of the voyage." (*m*) Thus in the case of *Bell* v. *Bell*, (*n*) where freight was insured at and from Riga to the United Kingdom, and the vessel on arrival at Riga was seized together with the cargo, and the freight on the voyage to Riga lost, it was held that the assured could not recover for the loss of this freight.

To such a length was this view carried, that in one case it was decided that the freight-earning voyage must be identical with the voyage insured by the policy. In the case of *Murdock* v. *Potts* (*o*) the policy was on freight of the ship *Bethiah* at and from Bordeaux to Virginia, but upon the evidence it appeared that the goods were to be carried from Bordeaux to St. Domingo, the ship merely calling at Norfolk in Virginia for orders. Lord KENYON held that the plaintiff was not entitled to recover as the freight payable was different from the freight insured. This decision has not, however, been followed.

Taylor v. *Wilson* (1812), 15 East, 324; 13 R. R. 488,

was an action on a policy on freight of the ship *John* upon a voyage at and from St. Ubes to Portsmouth.

FACTS.—The vessel had been chartered for a voyage from St. Ubes to Gottenburg, but was to call at Portsmouth to join a convoy. The vessel was lost before her arrival at Portsmouth.

Held that the plaintiffs were entitled to recover for the loss of freight.

(*m*) *Atty* v. *Lindo* (1805), 1 B. & P. N. R., p. 241.
(*n*) 2 Camp. 475.
(*o*) (1795), 2 Park. Insurance, 8th ed., p. 634.

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "The only question is whether a freight voyage may be insured part of the way. This was a voyage to Gottenburg by the way of Portsmouth, and the freight was to be earned at Gottenburg. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriters when they insured their freight from St. Ubes to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that voyage."

The second and the more important factor, to which may be ascribed the view, that an ordinary insurance upon freight is a contract of indemnity during the adventure in which it is to be earned, was the peculiar nature and incidents of freight. (*p*) At Common Law no right to freight *qua* freight arose until the voyage was ended and the contract performed (*q*), but by the Law Maritime an inchoate right to the freight was considered to arise as soon as the freight-earning voyage began. "In view of this law the inception of freight is the ship's breaking ground; and the inchoate right which then attaches is consummated upon her arrival at the port of destination." (*r*) In insurance law, as will be seen, a less strict view prevailed, but the fact that according to the Common Law and the

(*p*) Freight in the strict significance of the term is "the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery." Per BLACKBURN, J., in *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 A. C., p. 228. So strictly was this view held that it was laid down in an early case that remuneration payable previous to the arrival of the goods could not be sued for as freight; see *Blakey* v. *Dixon* (1800), 2 B. & P. 321.

(*q*) MacLachlan, Merchant Shipping, 5th ed., p. 517.

(*r*) MacLachlan, p. 543; see also *Curling* v. *Long* (1797), 1 B & P. 634. Where goods have been delivered to a shipowner to be carried, and the vessel has not broken ground on the voyage, the skipper cannot redemand the goods without offering to pay full freight. *Tindal* v. *Taylor* (1854), 4 E. & B. 219; Parson's Law of Shipping, pp. 179, 231. This right of the shipowner to retain the goods until full freight is paid is based on the rule that a contract once made cannot be dissolved except with the consent of both contracting parties, and not on the existence of a lien for the freight. Thus in the *Tornado* (1882), 108 U. S. 342 (Am.), where a vessel sank before breaking ground on the voyage, it was held that the master could not retain the cargo for purposes of transhipment, as it had become impossible to carry out the contract in the way contemplated, and the lien on the cargo had not yet come into existence.

Law Maritime no right to freight *qua* freight arose until the vessel had actually commenced to earn it by breaking ground on the voyage, undoubtedly influenced the view that an ordinary insurance on freight was intended to be an insurance of the freight which the vessel was in the course of earning.

From the time that freight commenced to be earned, an inchoate right to the freight was said to arise, and it was this inchoate right which was considered to be covered by the ordinary policy on freight.

"Freight is another word for the remuneration which the owner of a ship is entitled to receive at the end of the voyage for the use which has been made of his property, namely, for the whole ship if the use of the whole ship has been contracted for, or for the carriage of particular goods if such be the contract. But in neither of these cases is the owner entitled to freight unless the voyage be completed, though after the contract is entered upon and the voyage commenced, an inchoate right commences also to freight. It is this inchoate right which is the subject-matter of insurance, and which the underwriter engages shall not be defeated after its commencement by any of those perils which are described in the policy, and which would occasion the loss of freight." (*s*)

It was not sufficient for the assured to have entered into a contract of affreightment under which freight would be payable. It was necessary that he should have entered upon the contract and have commenced to earn the freight, for until then the inchoate right "which is the subject-matter of insurance" was not considered to arise. It might, therefore, be thought that the doctrine of the inchoate right to freight as used in insurance law referred to the inception of an insurable interest, and such indeed was the view adopted in America. But in this country it was regarded as referring to the inception of the risk.

Davidson v. *Willasey* (1813), 1 M. & S. 313; 14 R. R. 438,

was an action on a policy on freight valued at £4000 upon the ship *St. Andrew*, at and from any port or ports in Jamaica to her port of discharge in the United Kingdom.

(*s*) *See* the arguments for the plaintiff in *Thompson* v. *Taylor* (1795), 6 T. R., p. 478.

FACTS.—The plaintiff had entered into a charterparty under which the vessel was to proceed from Liverpool to Jamaica and there load a full and complete cargo of West Indian produce for Liverpool or London. The charterers undertook to load a full cargo and to pay freight at the current rate of freight one month from the discharge of the cargo. The ship arrived at Jamaica and took on board one-half of her homeward cargo, and goods sufficient to have loaded her were on shore ready to be shipped, but the vessel was stranded and became totally lost.

Held that as the voyage had commenced in which the freight was to be earned, the plaintiff was entitled to recover. (*t*)

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "The interest intended to be insured was the freight which the assured would have earned under the terms of the charterparty, if the voyage had not been stopped by the perils insured against; which has been held for upwards of twenty years past to be an insurable interest as freight. *Then* the question is, whether the assured were in the prosecution of that interest so as to have acquired an inchoate right to the freight at the time when the loss happened."

Moses & Another v. *Pratt* (1815), 4 Camp. 297; 16 R. R. 794,

was an action on a policy on the ship *Argus*, valued at £2000, and her freight, valued at £3000, at and from port or ports in Cuba to port or ports in St. Domingo and from thence to any port or ports in the United Kingdom. The plaintiffs sought to recover an average loss on the ship, and a return of premium for short interest on the freight.

FACTS.—By a charterparty the plaintiffs let the *Argus* to freight for a voyage from Liverpool to Cuba and St. Domingo and back, and the charterer covenanted to load her with a complete homeward cargo, and to pay freight for the same at a stipulated rate. The *Argus* proceeded to Cuba and St. Domingo, where

(*t*) *See* also *Mackenzie* v. *Shedden* (1810), 2 Camp. 431.

no cargo was provided for her, and was guilty of a deviation by going to a port in Jamaica before the loss happened, which the plaintiffs sought to recover.

Their right to that being abandoned, it was insisted that they were at all events entitled to the return of premium on the freight, no goods having ever been loaded on the freight of which the policy could attach.

Held that the plaintiffs were not entitled to a return of premium.

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "Had the ship been lost while waiting to take in a cargo, the underwriters would have been liable for the whole sum insured upon the freight. The charterparty created an interest on which the policy had attached, and there had been an inception of the risk, although no goods were put on board. Therefore there shall be no return of premium."

Truscott v. *Christie* (1820), 2 B. & B. 320; 5 Moore, 33; 23 R. R. 446,

was an action on a policy on freight and passage money valued at £5000 by the ship *Cornwall,* at and from Madras to the United Kingdom.

FACTS.—The plaintiff had entered into an arrangement with the Government of Madras to carry goods for them at a certain freight, and also to fit the vessel up with an extra deck, and make other alterations for the purpose of accommodating two hundred invalids, whom the Government engaged to send home at a fixed rate of passage-money. The alterations were commenced, a large part of the cargo was received on board, and water for one hundred invalids had been shipped, but before the alterations were completed, the ship was driven from her moorings and totally disabled.

Held that the plaintiff was entitled to recover in respect of all the goods and invalids, as there was an inception of the risk as soon as the preparations under the contract were commenced.

JUDGMENT.—DALLAS, C.J.: "This case appears to me to resolve itself into three points. First, whether there was any contract; secondly, if there was a contract, whether anything was done under that contract by the assured; thirdly, does the thing done, if it was done, constitute a part execution of the contract *and an inception of the risk?* As to the first point, I entertain no doubt. . . . Clearly there was such a contract as the plaintiff asserts; and the next question is, whether anything was done under the contract? It appears, then, that the ship was in part prepared for passengers, and that the completion of the preparations was prevented by perils of the seas. This was clearly something done under the contract; and there can be no doubt, that on the commencement of preparations under the contract, there was also an inception of the risk. It is urged that the alterations of the ship were not completed; but they were begun, and though none of the passengers were on board there was an inception of the voyage. . . . The question, then, being whether or no there has been an inception of the risk, let us inquire what is an inception of the risk. That may be answered by the words of Lord KENYON in *Thompson* v. *Taylor*. 'Here, as the plaintiff had begun to perform his part of the contract, as he had done something under it which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight.' This doctrine applies to the present case: here, something was done in part performance of the contract, which was not matured, because prevented by the perils of the seas; there was, therefore, *a clear inception of the risk.*"

From these cases it would seem that the doctrine of the inchoate right to freight was regarded in this country as referring to the inception of the risk. In America, on the other hand, the doctrine was regarded as referring to the inception of an insurable interest, (*u*)

(*u*) *See* Phillips' Insurance, 3rd ed., sect. 328. It is, however, misleading to treat the inchoate right to freight as referring either to the inception of an insurable interest in the freight or to the inception of the risk under the policy. The ordinary policy only covers freight which is being earned. Until something has been done towards earning the freight, the policy does not attach, and it does not attach because until then the freight does not come within the scope of the policy. *See* Kent's Commentaries, 12th ed., vol. 3, sect. 311, notes by O. W. Holmes, Jun.

but so long as an insurance on freight was treated as an insurance on the freight which the vessel was in the course of earning, it was immaterial which view was adopted. The American view purported to be based on the decisions in the English cases, and the distinction between the two views was not consciously recognised. The expressions in the English cases, which referred the doctrine to the inception of the risk, were explained by saying that until the insurable interest arose, the risk could not attach. In other words, under an ordinary policy on freight there would not be an inception of the risk until the freight commenced to be earned, because until the freight commenced to be earned, there would not be any insurable interest in freight which could be at risk.

"Had the plaintiffs an insurable interest, before or at the time when the loss happened, as stated by one of the counsel; or, had the risk then commenced, as it is put by another. There is no difference between them. Risk is the subject of the contract of insurance. If there be no risk, there can be no contract. Until the risk commences the contract does not attach. If the insured cannot or will not commence the risk, he has no claim to indemnity and the underwriters cannot retain the premium. In an interest policy there can be no risk, if there be no interest. The risk, then, can only commence when the interest commences, which leads to the question, when does an inchoate right to freight commence?" (*x*)

"In England and some of the American States there is no policy particularly adapted to insurance on freight; but the common form for insuring on ship or cargo is used, with only a brief memorandum in the margin or elsewhere on the policy, stating the insurance to be on freight. And the practice was formerly the same in this State. In such cases, as the parties have omitted to declare when the risk shall commence, it has been left to the Courts to settle that matter for them. And it has been held that the policy attaches as soon as there is an insurable interest in the freight; and that as a general rule, there is such an interest when the cargo is on board the ship and not before. But where there is a charterparty for a voyage, in the course of which the goods are to be taken on board and the

(*x*) Per WASHINGTON, J., in *Hart* v. *The Delaware Insurance Co.* (1809), 2 Wash., p. 350 (Am.).

freight earned, there is an inception of the risk the moment the ship breaks ground for the voyage, although the time for receiving the cargo has not yet arrived." (*y*)

Whether treated as referring to the inception of the risk or to the inception of an insurable interest, difficult questions arose as to when the inchoate right commenced. When did freight commence to be earned? In the case of *Thompson* v. *Taylor*, (*z*) where the policy was on "freight of the ship *Nancy*, at and from London to Teneriffe, at and from thence to any of the West India Islands, and at and from thence to the Bay of Honduras," and a charterparty for a similar voyage had been made, it was suggested on behalf of the assured that the test was whether the contract had been entered upon, and the voyage commenced, and whether there had been an inception of the voyage. It is not clear whether the expressions "after the contract is entered upon and the voyage commenced" and "from the inception of the voyage" merely referred to the beginning of the adventure contemplated by the charterparty, or were intended to convey that the vessel must have broken ground on the voyage. Lord KENYON, who professed to accept the argument of the plaintiffs, did not consider it necessary that the voyage should have commenced in the latter sense, and held that the true test was whether there had been an inception of the contract of affreightment, that is to say, whether the employment in respect of which the freight was payable had been entered upon, and in that way the adventure begun. But on the construction of the charterparty he came to the conclusion that there had been an inception of the contract, that the employment had begun by the sailing of the vessel from the Thames towards Teneriffe, and as the language used by the other judges was decidedly ambiguous, the distinction between the two views was not appreciated. Moreover, bearing in mind the old rule of the Law Maritime that "the inception of freight is breaking ground," it is not surprising to find many dicta to the effect that the answer to the question whether the freight had begun to be earned, depended upon whether the vessel had broken ground on the freight-earning voyage. "As soon as the ship broke ground at London

(*y*) Per BRONSON, C.J., in *Gordon* v. *American Insurance Co. of New York* (1847), 4 Denio, 360 (Am.).

(*z*) (1795), 6 T. R. 478.

an inchoate right to freight attached." (*a*) "There is an inchoate right to the sum agreed on for freight, so soon as the ship breaks ground." (*b*)

A similar view was expressed in a recent case. "This being an insurance of chartered freight, the shipowners must have an insurable interest in freight, and this they have if, having made a contract, the execution of which will give them freight, their ship being in a condition to execute the contract, breaks ground on the voyage described in the charterparty." (*c*)

The point was distinctly raised in the case of *Truscott* v. *Christie*, (*d*) where preparations for the voyage had been made, but the vessel had not broken ground, and the test laid down by Lord KENYON in *Thompson* v. *Taylor* was adopted.

"The question, then, being whether or no there has been an inception of the risk, let us inquire what is an inception of the risk? That may be answered by the words of Lord KENYON in *Thompson*

(*a*) Per HEATH, J., in *Atty* v. *Lindo* (1805), 1 B. & P. N. R., p. 243; see also per Lord ELLENBOROUGH in *Mackenzie* v. *Shedden* (1810), 2 Camp., p. 435; per LEBLANC, J., in *Davidson* v. *Willasey* (1813), 1 M. & S., p. 317.

(*b*) Per HOSMER, J., in *Riley* v. *Hartford Insurance Co.* (1817), 2 Conn., p. 373 (Am.).

(*c*) Per VAUGHAN WILLIAMS, L.J., in *Brankelow S.S. Co.* v. *Canton Insurance Office* (1899), 2 Q. B., p. 186.

In the *Progress* (1810), Edwards Admiralty Reports, vol. 1, p. 223, Lord STOWELL said: "The last question which I have to determine is, whether any and what salvage is due upon the freights of those vessels which had been chartered in this country under an agreement to proceed to Oporto in ballast, for the purpose of bringing home these cargoes of wine, and, in consequence of the recapture, have been enabled to carry that purpose into effect. Now, it is clear, that a service has been rendered to the vessels so circumstanced, and it is a service which goes the length of putting them in a condition to recover their whole freights, which depended entirely upon their final arrival here. As to the freights of the vessels that were taken up at Oporto, no salvage is asked upon them, and certainly it could not have been contended that any would be due, as the voyage had not commenced. But these vessels, which had gone to Oporto from this country under a charterparty for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture; they had actually broken ground, as the phrase is, and had entered upon that adventure out of which their profits were to arise. While lying in the harbour of Oporto they were in the course of earning their freights; they were *in itinere*, and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charterparties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect."

(*d*) (1820), 2 B. & B. 320, *ante*, p. 19.

v. *Taylor*. 'Here, as the plaintiff had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight.' This doctrine applies to the present case; here, something was done in part performance of the contract, which was not matured, because prevented by the perils of the seas; there was, therefore, a clear inception of the risk."

The test, therefore, as laid down in the case of *Thompson* v. *Taylor*, and re-affirmed in the case of *Truscott* v. *Christie*, was, whether there had been an inception of the contract of affreightment, that is to say, whether the employment in respect of which the freight was payable had been entered upon and in that way the adventure begun. In the application of this test difficulties arose. The voyage contemplated by the contract of affreightment might not be a simple voyage from one port to another; it might be a double voyage out and home, or it might consist of a series of voyages. Some hesitation was felt in saying that freight to be earned during a homeward voyage was in course of being earned during the outward voyage. But in the various cases in which the point was raised, the Courts decided on the construction of the contracts of affreightment that the freight, although dependent on the completion of the homeward voyage, was in fact payable in respect of the whole contemplated voyage out and home. The outward voyage and the homeward voyage were not treated as separate adventures, but as parts of one entire adventure. "In short, the great point in all these cases seems to be whether there is one entire contract for the voyage out and home, and whether the freight is entire." (*e*)

The point was first raised in the case of *Thompson* v. *Taylor*, (*f*) where the charterparty provided "that the ship should on or before the 9th of February next depart out of the Thames and direct proceed to Port Oratava in Teneriffe, and after the ship should be ready to receive goods, lie 20 days and load and receive on board her from Messrs. Cox 500 pipes of wine, and then sail and proceed to Barbadoes

(*e*) Park, Insurance, 8th ed., vol. 1, p. 62; see also per HOSMER, J., in *Riley* v. *Hartford Insurance Co.* (1817), 2 Conn., p. 373 (Am.).

(*f*) (1795), 6 T. R. 478.

. . . freight for the said voyage being at the rate of 35*s.* per pipe, the said freight to be paid within 20 days after a certificate of the delivery of the wine." The policy was on half of the freight of the ship *Nancy,* "at and from London to Teneriffe, at and from thence to any of the West India islands, and at and from thence to the bay of Honduras," and the vessel was lost while proceeding on the voyage towards Teneriffe.

It was argued on behalf of the insurers that "the sustaining of this action will open a door to great frauds, and is directly contrary to the policy of the Act of George II. Suppose a charterparty of affreightment for a certain voyage, and after that voyage performed a covenant to take in other goods and bring them home, the freight of the second voyage could not be insured before the goods were taken in, or the voyage commenced, for otherwise double freight might be recovered. Now, the present is as much two distinct voyages as if the vessel had proceeded with a cargo to Teneriffe, where she was to unload and take in other goods."

But according to Lord KENYON "the contract under the charterparty was entire, and we cannot divide it; the ship was to sail from hence to Teneriffe, where she was to take wine on board and carry it to the West Indies; he was to receive freight for the whole voyage; and the plaintiff had performed part of the contract."

Atty v. *Lindo* (1805), 1 B. & P. N. R. 236; 8 R. R. 788,

was an action on a policy of insurance on the freight of the ship *Stranger,* at and from London to Jamaica, with liberty to touch at Madeira and discharge and take in goods there. By a charterparty between the plaintiff as owner and one J. S. de Franca it was agreed that the ship should take in such goods at the port of London as the freighter should think proper and proceed therewith to the island of Madeira, and there deliver all or such part of the goods as the agents of the charterer should direct, and there receive on board from the charterer or his agents such quantity of wine as he or they should think proper, and proceed therewith to Kingston in the island of Jamaica. And it was further agreed that the charterer should pay to the plaintiff £135 in full for freight or hire of the ship during the whole of the voyage from London to Madeira and

from thence to Kingston in Jamaica; such freight to be paid in Madeira on a right and true delivery of the goods that might be shipped in London for that place, by London Particular Madeira wine, at the rate of £40 per pipe, which wine should be carried in the ship to Jamaica free of freight.

FACTS.—The vessel loaded a cargo at London for Madeira, but before it had been discharged, or the wine by which the freight was to be paid had been put on board, the vessel was lost.

Held that the plaintiff was entitled to recover for a total loss.

JUDGMENT.—Sir JAMES MANSFIELD, C.J.: "In order to judge of the question, we must look at the charterparty, by which it is agreed that De Franca shall pay to the plaintiff the sum of £135 in full for freight by the said ship during the whole of the said voyage from London to Madeira, and from thence to Kingston in Jamaica; which freight is to be paid in Madeira on a true delivery of the goods shipped in London, by Madeira wine at £40 per pipe, which wine is to be carried in the ship to Jamaica free of freight. The charterparty, therefore, treats the whole as one voyage from London to Jamaica, touching at Madeira. The freight for the whole voyage is to be paid in one gross sum, and that sum is to be paid in Madeira wine, valued at a certain sum, at Madeira: the payment, therefore, is local and indivisible, and on payment of the freight in Madeira wine, the wine is to be carried in this particular ship from Madeira to Jamaica . . . Without any fault being imputable to any one, an accident happened, which rendered it impossible for the captain to receive the freight at Madeira. Then why may he not recover it from the underwriters? While the ship was at Madeira, she was in the course of the voyage at and from London to Jamaica, taking Madeira on the way; and the owner was to receive the freight at Madeira to be carried in the intended voyage to Jamaica. The owner, therefore, was deprived of his freight by perils insured against by the policy."

Horncastle & Others v. *Suart* (1806), 7 East, 400; 8 R. R. 649,

was an action on a policy of insurance on freight of the ship *Marquis of Lansdown* at and from Dominica to London. The vessel had been chartered for a voyage from London to the island of Dominica and back to London, and the charterparty provided that the master should take on board in the river Thames all such goods as the freighters could procure on freight for Dominica, and sail with the first West India convoy to Dominica, and there deliver her outward-bound cargo, and take on board a full cargo of West India produce at the current freight, which the charterers bound themselves to ship, and being so loaded proceed to England. The charterers agreed to pay the plaintiffs half of the net freight which the ship should make outwards, provided such net freight should exceed £1000, but if it did not amount to £1000, then they should pay the plaintiffs £500.

Facts.—The vessel arrived at Dominica and delivered her outward cargo, except such part as was necessary and customary to keep on board until some part of the homeward cargo should be loaded, but before any of the homeward cargo, which was lying ready, could be loaded, the vessel was captured and the homeward freight lost.

Held that the plaintiffs could recover, "the contract of affreightment by the charterparty being entire, and the risk on the policy having commenced."

Lord Ellenborough said that it was clear that the underwriter was liable upon the authority of *Thompson* v. *Taylor;* the voyage having commenced in which the freight was to be earned according to the terms of the charterparty, which made it one entire contract, and which voyage was insured by the policy.(*g*)

Ellis v. *Lafone & Another* (1853), 8 Exch. 546; 22 L. J. Ex. 124; 17 Jur. 213; 1 W. R. 200; 91 R. R. 615,

was an action on a policy of insurance on "freight advanced at and from Monte Video to Havre." A vessel had been

(*g*) *See* also *Mackenzie* v. *Shedden* (1810), 2 Camp. 431; *Davidson* v. *Willasey* (1813), 1 M. & S. 313, *ante*, p. 17.

chartered to proceed to the Falkland Islands, and thence to Santa Cruz and Monte Video and there load a cargo of guano or other merchandise and proceed therewith to Havre; freight at the rate of £250 per month to be paid in the following manner, viz., one month's pay when the vessel sailed from the Falkland Islands, and the balance on true delivery of the cargo.

FACTS.—The vessel after discharging her cargo at the Falkland Islands proceeded to Santa Cruz and Monte Video and there loaded a homeward cargo, but on the voyage to Havre was lost.

The charterer had paid £250 when the vessel left the Falkland Islands, which he claimed from the underwriters, but the claim was resisted on the ground that the cargo for the Falkland Islands having been safely delivered, and the vessel therefore having earned her first month's pay, this sum was no longer at risk on the subsequent voyage.

Held that the assured could recover as the voyage under the charterparty was entire, and the £250 was not a separate sum payable for the voyage to the Falkland Islands, but a portion of the entire sum payable for the entire voyage, and therefore remained at risk until the vessel arrived at Havre.

In the foregoing cases the voyages out and home had been fixed under a single contract of affreightment, and they were regarded as being portions of one entire adventure. But the subsequent voyage might be quite distinct from the earlier one. In such an event, when would the one adventure end, and the other adventure begin? In one case, where freight had been insured for the homeward voyage, the vessel had arrived at the outward port of discharge, which was also the port of loading for the homeward voyage, and had discharged all the outward cargo with the exception of a small portion which, according to the shipowner, it was necessary to leave on board as ballast, and which, according to the underwriters, was not required as ballast. The underwriters contended that as the outward cargo had not been discharged, the risk on the homeward cargo had not attached. The question was left to the jury whether the vessel was in a condition to receive the homeward cargo, and this question the jury answered in favour of the assured, who recovered.

Williamson v. *Innes* (1831), 8 Bing. 81 n.; 1 Moo. & R. 88; 34 R. R. 629 n.; 42 R. R. 765,

was an action on a policy of insurance on freight at and from Algoa Bay and Table Bay, both or either, to London.

The declaration stated that the ship had arrived, and was in good safety at Algoa Bay, that a homeward cargo was ready for her under her charterparty, and that before it was put on board she was lost by perils of the sea. Plea, general issue.

At the trial, the captain proved his arrival at Table Bay; the discharge of that part of the cargo which was destined for that place; and that he took in about sixty tons of goods for Algoa Bay, where he arrived on the 30th of September and came to anchor. Till the 8th of October he was engaged in discharging his outward cargo, but on that day he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as his load was reduced to about seventy tons, which, in his judgment, was necessary for the safety of the ship, of 144 tons register; and he intended to take in, the next morning, part of the homeward cargo, which was ready for him. Before that time, however, the ship was lost in a hurricane.

For the defendant, it was contended that at the time of the loss, the ship was not in a state to begin to take in her homeward cargo, and consequently that the voyage at and from Algoa Bay had not commenced.

Several captains of vessels were called, who stated that, in their judgment, thirty tons were quite sufficient to keep in the ship for her safety, and that with seventy tons of her outward cargo on board, she could not be ready to take in her homeward cargo.

Lord Lyndhurst, C.B., told the jury that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, the verdict ought to be for the defendant.

Verdict for the plaintiff.

From this case it has been sought to deduce the principle that the vessel must be in a condition to take in her cargo, before the risk

on freight under such circumstances can attach, but there is no reason for believing that the case was intended to create or that the counsel considered that they were contending for any hard and fast rule. The question was whether the homeward voyage had begun, and the question left to the jury—whether the outward cargo had been discharged and the vessel, therefore, in a condition to take in her homeward cargo, seems to have been intended merely as a test. The principle supposed to have been laid down in this case formed the basis of the contentions of the underwriters in the case of *Foley* v. *United Fire Insurance Company*, but it was emphatically rejected by the Court. "It is said that the interest only attaches on a policy like this—that the risk only attaches when the voyage on which the freight is to be earned has commenced; and it is insisted that the risk here could not commence before the [outward] cargo was discharged. If that argument be correct, it amounts to this, that there never can be an effective insurance on freight to be earned on a voyage from a given port, until the ship is in a condition to receive goods on board. But we find a long series of cases, beginning with *Thompson* v. *Taylor*, and coming down to the recent case of *Barber* v. *Fleming*, which conclusively establish the contrary. The real doctrine is this: if the voyage by means of which the chartered freight is to be earned has commenced, there is an inchoate interest in the freight, and the risk attaches, provided the language of the charter, taken with the policy, will warrant that view of the case." (*h*)

Foley v. *The United Fire & Marine Insurance Company of Sydney* (1870), L. R. 5 C. P. 155; 22 L. T. 108; 39 L. J. C. P. 206; 18 W. R. 437,

was an action on a policy of insurance on the "chartered freight, valued at £1150, of the *Edmund Graham* at and from Mauritius to rice ports, and at and thence to the United Kingdom."

FACTS.—The plaintiff was the owner of the *Edmund Graham*, and when the vessel was about to sail with cargo from Calcutta to Mauritius, he chartered her for a further voyage from Mauritius to the rice ports. The charterparty provided that the vessel should with all convenient speed proceed on her

(*h*) Per KELLY, C.B. (1870), L. R. 5 C. P., p. 159.

present voyage to Mauritius, and having discharged her cargo should proceed to Akyab and there load a cargo of rice in bags and proceed therewith to a port in the United Kingdom. The vessel arrived at Mauritius and proceeded to discharge her cargo. When about half of the cargo had been discharged, the vessel was driven on shore and became a total loss.

It was argued on behalf of the defendants that the policy on the chartered freight could not attach until there was an inception of the chartered voyage, and that at the time of the loss that voyage had not commenced, as the vessel had not completed her voyage to Mauritius. The interest in the chartered freight did not begin when the charter was made, but something must first be done under the charter to earn the freight. The vessel, it was true, was at Mauritius, and if it had been a policy on ship the risk would have attached, but different principles applied in the case of a policy on ship, and as the vessel had not completed the previous adventure, and was not at Mauritius ready to receive cargo or to proceed on the chartered voyage, she could not be said to be at Mauritius for the purpose of earning the chartered freight, or to be in the course of earning the freight, and the policy, therefore, did not attach.

Held that the risk under the policy attached upon the arrival of the vessel at Mauritius, and that the assured was entitled to recover.(*i*)

The question whether the freight-earning voyage has commenced is a question of fact. In the various decided cases the Courts laid

(*i*) In the case of *Warre* v. *Miller* (1824), 4 B. & C. 538, a vessel was to discharge her outward cargo and receive her homeward cargo at several different ports. At the time of the loss the vessel was proceeding to a port for the double purpose of delivering the remaining part of her outward cargo, and of taking in a part of the homeward cargo, that is to say, although the earlier adventure had not terminated, the subsequent adventure had begun, and the jury found a verdict for the plaintiff who had insured the homeward freight.

A writ of error was brought, and in the Court of King's Bench the point was raised on behalf of the defendant that the risk had not attached as the vessel at the time of the loss was not employed solely upon purposes connected with the homeward voyage, but this point was not allowed to be argued as it was not disputed at the trial, and the Judge had not been requested to give any direction to the jury upon it.

down certain propositions as to when the freight began to be earned, but these propositions must not be regarded as inflexible rules of universal application, but as useful tests to be applied for the purpose of ascertaining whether the freight-earning voyage has in fact commenced or not.

Barber v. *Fleming* (1869), L. R. 5 Q. B. 59; 39 L. J. Q. B. 25; 10 B. & S. 879; 18 W. R. 254,

was an action on a policy of insurance on "freight chartered or otherwise valued at £3600 on the ship *Cambodia* at and from Bombay to Howland's Island and thence to the United Kingdom, with liberty to proceed and sail to and touch and stay at any ports or places whatsoever."

FACTS.—By a charterparty the *Cambodia*, then lying in the harbour of Bombay, was chartered for a voyage from Howland's Island to a port of discharge in Great Britain for a complete cargo of guano which the charterers engaged to ship. The ship was to be at Howland's Island on or before the 1st of June, 1867, or the charterers were to have the option of declaring the charter null and void. The *Cambodia* sailed from Bombay for Howland's Island in ballast but was wrecked.

It will be noticed that the charterparty was not in the usual form, viz. that the ship being at Bombay should with all convenient speed proceed to Howland's Island and there take in the cargo. The only stipulation was that the ship should be at Howland's Island at a date about ten months after the date of the charter, the voyage from Bombay direct taking about three months. This case, therefore, raised the question whether an assured could recover for a loss of freight although the chartered voyage had not commenced, and although nothing had been done under the terms of the contract of affreightment.

Held that as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island, in order to earn the freight under the charter from thence to the United Kingdom, the inchoate right to the freight had commenced, and that the plaintiff could recover for the loss under the policy. (*k*)

(*k*) See also *Mercantile Steamship Co., Ltd.* v. *Tyser* (1881), L. R. 7 Q. B. D. 73.

JUDGMENT.—BLACKBURN, J.: "We have to see whether there was freight lost during the voyage which involves the question whether this chartered freight had come into existence at the time the accident happened which caused the alleged loss; whether at that time the interest had commenced. . . . The law seems settled by a variety of cases, as I find it laid down by Mr. Phillips, in his book on Insurance, at section 328, where he says, 'In regard to the commencement of this interest [in freight], it is a general rule that it commences, not only by the vessel sailing with the cargo on board, but also when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight.' I think that is the accurate rule. When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which if afterwards destroyed by one of the perils insured against is lost, and ought to be paid for by the underwriters.

"But the counsel for the defendant says, in each of the cases cited, the party was bound to sail at once on the voyage, for the contract was that the ship should proceed to the port of loading with all convenient speed; and, consequently he takes the distinction in the present case—that it is not sufficient, that you are sailing in order to carry out the charterparty, but there must be a starting on the voyage because you are required and bound to do it by the charterparty; and consequently under this particular charterparty, where, instead of saying the ship at Bombay shall proceed at once to the Chincha Islands, the charterparty only requires that she shall be there by a particular day, the shipowner might make a seeking voyage on the way there; and that therefore he was not bound to go. But that is not within the spirit and reason of the rule. The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to show it is so no longer speculative, but he had actually begun to do something which makes the inchoate

interest attach, and makes it a real thing; and it seems to me that as soon as the ship, although not bound to go direct from Bombay to the Chincha Islands, had begun to sail there, the interest had sufficiently attached, and consequently on that point the plaintiff is right." (*l*)

Now, it has been seen that an ordinary insurance upon freight has always been regarded as a contract of indemnity during the adventure in which the freight is to be earned. Until the freight-earning adventure began, the inchoate right to freight did not arise, and it was this inchoate right to freight which, it was considered, was intended to be covered by the policy. According to early English decisions the doctrine of the inchoate right to freight referred to the inception of the risk; according to the American cases it referred to the inception of an insurable interest, and this latter view was adopted by BLACKBURN, J., (*m*) a professed admirer of Phillips, the well-known American writer on the law of insurance. So long as insurances on freight were limited to the freight which a vessel was in the course of earning, it was immaterial which view was adopted, but the American view has given rise to an impression that there cannot be an insurable interest in freight until the freight-earning voyage has commenced. This impression is erroneous, for, as was said by Lord ESHER, (*n*) "no doubt as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insurable interest." The ordinary policy only covers

(*l*) There are expressions used by the learned judge which it is not easy to follow, and when he says that "as soon as the shipowner has taken steps and incurred expense upon the voyage towards earning the freight, his interest ceases to be a contingent thing, but becomes an inchoate interest," it is supposed that no more is meant than that the contemplated adventure has begun. *See* notes by O. W. Holmes, Jun., to par. 311 of Kent's Commentaries, 12th ed., vol. 3.

(*m*) *See Barber* v. *Fleming*, *ante*, p. 33.

(*n*) In the *Copernicus* (1896), P., p. 239. According to the report in 65 L. J. Adm. 108, Lord ESHER said: "A shipowner has an insurable interest in freight when he has a binding contract to put goods on board his ship by which freight can be earned. If that contract is contained in a charterparty, then he has such insurable interest the moment the charter is signed." For a similar view *see* per COCKBURN, C.J., in *Barber* v. *Fleming* (1869), L. R. 5 Q. B., p. 67. "It is supposed that a party who has made a contract by which he is to earn freight has an insurable interest at once, although the contract is not to be performed for six months." *See* notes by O. W. Holmes, Jun., to par. 311 of Kent's Commentaries, 12th ed., vol. 3.

freight from the time that it commences to be earned, but freight may be insured from the time that it is engaged, provided that the nature of the insurance is sufficiently indicated by the policy. This was decided by the House of Lords in the case of *Rankin* v. *Potter*.

Rankin v. *Potter* (1873), L. R. 6 H. L. 83; 29 L. T. 142; 42 L. J. C. P. 169; 22 W. R. 1; 2 Asp. M. C. 65,

was an action on a policy on homeward chartered freight by the *Sir William Eyre*, at and from the Clyde to Southland, while there, and thence to Otago (N.Z.) and for thirty days in port there after arrival.

Facts.—On December 7th, 1862, the vessel left Greenock on a voyage to Southland and thence to Dunedin in Otago (N.Z.) having a general cargo and a large number of government emigrants on board. On February 9th, 1863, while the vessel was on her outward voyage, a charterparty was entered into with one De Mattos, under which the *Sir William Eyre*, having discharged her cargo and passengers at Otago, was to proceed to Calcutta and there being tight, staunch, and strong and in every way fitted for the voyage, load a homeward cargo to be provided by De Mattos for Liverpool or London.

While on the voyage to Dunedin the vessel took the ground on several occasions, but arrived at Port Chalmers, the port of Dunedin, on July 4th, 1863. After some temporary repairs had been effected the vessel sailed for Calcutta, where she arrived on June 7th, 1864, and a survey was held which showed that the vessel had sustained so much damage as a result of the grounding that the repairs necessary to make the ship seaworthy and enable her to bring home a cargo, would exceed the value of the ship when repaired. The homeward voyage had therefore to be abandoned and the freight was lost.

Held that the assured was entitled to recover.

The voyage insured was treated (*o*) as being quite distinct from the voyage upon which the freight was to be earned, and the case,

(*o*) Blackburn, J., however, treated the case as falling directly within the principles of *Barber* v. *Fleming* and *Foley* v. *United Fire, etc., Insurance Co.*

therefore, undoubtedly involved the point whether freight to be earned upon a subsequent voyage could be insured during the previous voyage. "The case of insurance of specific chartered freight to be earned upon a future voyage against perils to be incurred in the current one, is, so far as we can learn, exceptional in practice, though not unprecedented. An ordinary insurance on freight is a contract of indemnity, during the adventure in which the freight is to be earned." (*p*)

The underwriters did not dispute that the plaintiffs had an insurable interest or that the risk had attached, but suggested that "the interest insured here was not freight, but an interest to be derived from the charterparty on procuring a cargo, and so earning freight. The underwriter, therefore, did not insure freight; he did not insure even a chose in action—an existing right to a certain amount of money—but only a mere speculation, a claim on the part of the assured to have a homeward freight supplied to him."

But this view was not accepted.

> "My Lords, in order to answer your Lordships' questions, it seems to me convenient to determine in the first place, what is the correct interpretation of the policy in respect of which these questions arise, and to point out its peculiarity. What is the subject-matter insured? The description is that the insurance is made 'on homeward chartered freight.' Having regard to the surrounding circumstances when the policy was made, to these words of reference, and to the case, the policy is not on homeward freight generally, *i.e.* on any homeward freight, but on the homeward chartered freight to be earned under the charterparty of the 9th of February, 1863. It was argued that the subject-matter insured was not freight, strictly so called, but some right which the counsel described at different times in different terms. It seems to me that those terms are either other phrases to describe the charterparty freight I have mentioned, or that they do not describe what is the only subject-matter insured by this policy. The voyage insured, as descriptive of the voyage during which the perils insured against may arise, is a voyage 'at and from the Clyde to Southland,

(*p*) Per WILLES, J. (1868), L. R. 3 C. P., p. 567.

while there and thence to Otago (N.Z.), and for thirty days, in port there, after arrival.' *This is a different voyage from, and does not comprise any part of the voyage on which the charter-party freight can be earned,* which latter is a voyage from Calcutta to Liverpool or London. The subject-matter insured then is freight; the freight insured is not any, but one particular freight; it is not freight which might be earned on the voyage insured or part of it; the goods in respect of the carriage of which the insured freight may be earned, cannot be at risk during any part of the voyage insured; and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. Assuming then, this to be a valid policy, which is not disputed, the true interpretation of the contract seems to be, that the insurers undertake to indemnify the assured if there should be a loss of the freight to be earned by the charterparty, in consequence of and proximately caused by such injury to the ship from a peril insured against during the voyage from England to New Zealand, as will prevent the assured from being able to earn the whole or any part of the charterparty freight on the voyage from Calcutta to England." (*q*)

"First upon the question as to the loss of the freight, it is necessary to bear in mind the exact nature of the insurance. The freight insured is chartered freight upon a cargo to be loaded on board the *Sir William Eyre* at Calcutta and to be conveyed to Liverpool or London. The voyage insured is 'at and from Clyde to Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there, after arrival.' In other words it is an insurance that the assured shall not be prevented earning the freight under the charterparty by any of the perils of the sea, which might happen on the voyage from Clyde to Otago, and for thirty days afterwards. *As this outward voyage is entirely distinct from that on which the freight was to be earned,* and as no right to such freight could possibly accrue until the arrival of the *Sir William Eyre* at Calcutta, the loss of the freight could only happen by such damage to the ship by perils of the sea, during the time

(*q*) Per BRETT, J., L. R. 6 H. L., p. 97.

covered by the policy as would prevent the assured from earning the chartered freight on the voyage from Calcutta to England." (*r*)

This case is authority for the proposition that freight to be earned on a subsequent voyage may be insured during the previous voyage, and from this it follows that an insurable interest in freight may exist although the adventure in respect of which it is payable has not commenced. (*s*) There would seem to be now no doubt but that freight to be earned on a subsequent voyage can be insured during the previous voyage, and the practice, which could be described in 1868 as being exceptional, is now by no means uncommon.

Turnbull, Martin & Company v. *Hull Underwriters Association, Limited*, [1900] 2 Q. B. 402; 69 L. J. Q. B. 588; 82 L. T. 818; 5 Com. Cas. 248; 9 Asp. M. C. 93,

was an action on a policy for £1000 on freight of the *Buteshire*, "at and from London to any port or ports and/or place or places in any order or rotation in Australia and/or Tasmania and/or New Zealand, risk to continue until steamer sails from final loading port on homeward voyage, on freight of frozen meat chartered or as if chartered, on board or not on board . . . value £15,000. . . . Chartered freight and freight are warranted free from all claims consequent on loss of time whether arising from a peril of the sea or otherwise."

FACTS.—While the policy was in force a fire occurred on board the *Buteshire* at Sydney, whereby her refrigerating installation and machinery were destroyed. The damage could not be repaired at Sydney, and it was therefore impossible for the ship to load or carry the frozen meat which had been engaged, or any other frozen meat on the homeward voyage, and the frozen meat freight was lost.

(*r*) Per Lord CHELMSFORD, L. R. 6 H. L., p. 153.

(*s*) According to the M.I. Act, 1906, sect. 3 (1), Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*b*) The earning or acquisition of any freight . . . is endangered by the exposure of insurable property to maritime perils.

The main question raised in the case was whether the claim was consequent on loss of time within the meaning of the clause in the policy, and no doubt was expressed as to the sufficiency of the interest. At the commencement of his judgment, MATHEW, J., said: "This was an action to recover a total loss on a policy on freight on a cargo of frozen meat. The insurance was on the outward voyage of the steamship *Buteshire* for freight expected to be earned on the homeward voyage." (*t*)

Scottish Shire Line, Ltd., & Others v. *London & Provincial Marine & General Insurance Company, Limited* (1912), 3 K. B. 51; 107 L. T. 46; 81 L. J. K. B. 1066; 17 Com. Cas. 240; 12 Asp. M. C. 253; 56 S. J. 551,

was an action on a policy for £2000 on "freight on frozen meat and/or apples and/or refrigerated produce valued at £15,000, chartered or as if chartered, on board or not on board of the ship or vessel called *Ayrshire* . . . lost or not lost at and from any ports or places in any order or rotation in the United Kingdom to any port or places in any order or rotation in Australia and/or Tasmania. . . . Risk to commence at once and continue in its entirety until steamer sails from final loading port on homeward voyage. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date."

FACTS.—While on the way to Australia the *Ayrshire* came into collision and was seriously damaged. The repairs took some three months. The plaintiffs had previously made a contract dated October 14, 1909, with a firm at Hobart, which provided that "the owners, on or about the 20th day of March next, subject to loss, detention or injury from *force majeure*, agree to have the steamship *Ayrshire* at Hobart with a reserve space in the insulated holds, ready to start loading 40,000 cases of apples, which the companies agree to supply to the said ship."

Owing to the delay necessitated by the repairs, the freight on this cargo was lost.

(*t*) In *Ward* v. *Weir* (1899), 4 Com. Cas., p. 222, MATHEW, J., said: "There is abundant authority that, during the pendency of the outward voyage, the homeward freight may be insured, and that the policy does attach."

Held that if the defendants had not been entitled to avoid the policy on the ground of the non-disclosure of a material fact, the plaintiffs would have been entitled to recover for the loss of the contract freight.

The foregoing remarks have dealt with questions relating to an insurable interest in chartered freight. The term chartered freight may lead to some confusion. It is submitted that it does not refer merely to freight payable under a charterparty, but means freight payable under a contract relating to the use and hire of a vessel or of space in a vessel or to the carriage of goods in a vessel which the shipowner undertakes to provide. (*u*) In the cases no distinction has been drawn between freight payable under the terms of a charterparty or under a contract of affreightment in any other form, and it would seem that in principle no distinction can be drawn. As was pointed out by BURROUGH, J., in the case of *Truscott* v. *Christie*, "it makes no difference whether the contract was by charterparty or otherwise; it is sufficient that there was a contract. The word charterparty frequently misleads, and is apt to convey the idea of something extraordinary, but there is no magic in the word charterparty, and an agreement of any sort is equally valid." The form of the contract is immaterial for "this circumstance only varies the mode of proof, without altering the principles on which the rights of the parties depend." (*x*) In the case of *Parke* v. *Hebson* (*y*) there was no complete or definite contract for the whole amount of

(*u*) Chartered freight, it is submitted, comprises the remuneration payable for the three kinds of hiring referred to by Lord CAMPBELL, C.J., in *Schuster* v. *McKellar* (1857), 7 E. & B., p. 724, viz. "locatio navis, locatio navis et operarum magistri et nauticorum, locatio operis vehendarum mercium."

In *Reg.* v. *Judge of City of London Court*, [1892] 1 Q. B., p. 290, Lord ESHER, M.R., said: "With reference to the words, claims relating out of any agreement made in relation to the use and hire of any ship, it has been said that you cannot find words which more perfectly describe a charterparty. To my mind there are ninety-nine out of a hundred charterparties which do not give the hire of a ship at all. But it is said they give the use of a part of the ship. They do nothing of the kind. There are charterparties, rare and few, which do amount to a hire of the ship. Those are exceptional charterparties. A charterparty is an agreement between the shipowner and the shipper with regard to the carriage of goods."

(*x*) Per Lord ELLENBOROUGH in *Patrick* v. *Eames* (1813), 3 Camp., p. 443. *See* also *Warre* v. *Miller* (1825), 4 B. & C. 538; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45.

(*y*) Cited by RICHARDSON, J., in *Truscott* v. *Christie* (1820), 2 Br. & B., p. 326.

the freight. The ship was a seeking ship, and was to complete her loading at a number of different places. Having part of her cargo on board, she was lost at Jamaica in passing from one port to another to complete her cargo. The plaintiff contended that he was entitled to recover in respect of freight for that part of the intended cargo which was not on board at the time of the loss as well as for that which was on board, and he produced several letters from merchants and plantation owners respecting the intended shipments. There was no contract for any specific freight, but it was to be paid according to the terms usual in that trade, which were well understood. The Court thought that the plaintiff might recover under the principle of *Thompson* v. *Taylor*, (*z*) a case in which the freight was payable under a charterparty.

Nor is it necessary that the contract should relate to the whole vessel. (*a*) In principle no distinction can be drawn between a contract for a full and complete cargo, a contract for a cargo capable of filling the major portion of a vessel's carrying capacity, and a contract relating to goods which would occupy only a small space, and it is submitted that the freight payable under any of these contracts comes within the expression "chartered freight." (*b*)

(*z*) (1795), 6 T. R. 478.

(*a*) A charterparty has been defined as a "contract of affreightment by which an entire vessel or some principal part thereof is let," Stephens' Commentaries, 16th ed., vol. 2, p. 245; Maclachlan, 5th ed., p. 374; Abbott, 14th ed., pp. 155, 328. Charterparties are, however, frequently met with which relate to only a portion of the vessel's carrying capacity. In *Nelson* v. *Nelson Lines*, [1908] A. C., p. 110, Lord LOREBURN said: "The contract which must regulate this controversy is called a charterparty. It is an agreement by shipowners to supply and by charterers to fill a part of each vessel. The rest of the space was to be filled with cargo of others." *See* also *Potter* v. *New Zealand Shipping Co.* (1895), 1 Com. Cas. 114.

(*b*) Pothier treats these three kinds of contracts as coming within the definition of contracts by charterparty.

"The contract of charterparty is a contract for the hiring of ships or vessels. . . . The contract is also denominated affreightment, from the word freight, which signifies the hire agreed to be paid for the use of a ship. A freighter is one, who hires a ship to convey his merchandize to any particular place.

"It may be defined to be a contract by which a person lets a ship, in part or in whole, to a merchant for the conveyance of his goods; the latter engaging to transport them in his ship to the place of their destination for a certain sum, which the hirer reciprocally engages to pay the latter as freight, that is, for the hire of the ship.

"A ship may be let to hire in whole or in part. Hiring a ship in part is either by the quintal or the ton. The quintal is a hundredweight. To hire a ship by

"There is no difficulty in understanding what is meant by chartered freight. It is contrasted with bill of lading freight. Chartered freight is remuneration paid to the shipowner by another who hires his ship or part of it, generally with an added contract that the shipowner's captain shall sign bills of lading for the charterer's benefit." (*c*)

The term chartered freight also includes, it is submitted, the freight payable in respect of freight engagements which provide for the carriage of specified goods. In such cases the right of the shipowner to the freight may be dependent on the continued existence of the goods, (*d*) and it may be raised as an objection to the right to insure such freight that even if none of the perils insured against were to come into operation, no enforceable right of action might arise, because the goods might perish before they could be delivered to the shipowner. But it is no objection to a right to insure that the interest may cease to exist by reason of causes or perils other than those insured against, provided that at the date of the loss there was an interest in existence which was lost by reason of perils insured against. "As to the objection that the plaintiff is not entitled to

the quintal, is to hire her for the lading and conveyance of so many hundred-weight of certain goods.

"The marine ton is a space of forty-two cubic feet. To let a ship by the ton, is to let a merchant the space of so many tons, therein to lade and convey his merchandise.

"When a ship has not been let entire, but by the quintal or ton, here it suffices for the master to receive the goods which he has engaged to receive, or to furnish such accommodation for the freighter's goods as he has engaged to furnish. In both cases he may dispose of the surplus of the ship as he pleases."

Pothier, Treatise on Maritime Contracts of Letting to Hire, translated by Cushing (1821), Preliminary Article and Article I.

(*c*) Per HAMILTON, J., in *Scottish Shire Line* v. *London & Provincial Insurance Co.*, [1912] 3 K. B., p. 65. In the case of *Turnbull, Martin & Co.* v. *Hull Underwriters Association*, [1900] 2 Q. B. 402, *ante*, p. 38, where freight of a homeward voyage was insured during the outward voyage, it appeared that at the time when the vessel started on the outward voyage no contracts for the shipment of homeward cargo had been made, but while the vessel was making her outward voyage, homeward cargo was booked and contracts were made. In argument it was suggested that the freight payable for this homeward cargo was not chartered freight, but according to MATHEW, J., "The several contracts of affreightment made with shippers had the same operation as if they were grouped in a charter-party."

(*d*) Cf. *Howell* v. *Coupland* (1876), L. R. 9 Q. B. 462; 1 Q. B. D. 258; *Nickoll* v. *Ashton*, [1901] 2 K. B. 126; Carver, Carriage by Sea, sect. 256.

recover, if, perhaps his gains might have been prevented by accidents other than the perils of the sea, the contrary has often been held, for there are many subjects of insurance which might, by possibility, be lost by other than the perils of the sea; if, however, they are actually lost by means of such perils, that is sufficient." (*e*)

With regard to ordinary freight, that is to say, the freight payable for the carriage of particular goods, an insurable interest, it is submitted, arises as soon as a contract is made with somebody for the shipment of the goods. (*f*) Under ordinary circumstances, however (and more especially in former times), no contractual relationship with regard to the goods to be carried arises until the goods are put on board, and to this may be attributed the general rule that an insurable interest in freight of this description does not arise until the goods are put on board. Until then there is no freight in existence, but only an expectation of obtaining it, and this cannot be insured by a policy on freight.

Forbes v. *Cowie* (1808), 1 Camp. 519,

was an action on an open policy on the freight of the *Chiswick*, at and from St. Domingo to Liverpool.

Facts.—The *Chiswick* arrived with a cargo, belonging to the plaintiff, to be bartered for goods. Part of the outward cargo was exchanged for fifty-five bales of cotton which were put on board. The remainder of the outward cargo was still on board when the vessel was lost.

Held that the assured could not recover except as to freight on the fifty-five bales which had been shipped.

Forbes v. *Aspinall* (1811), 13 East, 323; 12 R. R. 352,

was an action on a valued policy of the freight of the *Chiswick*. The facts were similar to those in *Forbes* v. *Cowie*.

Held that except as to the fifty-five bales, the assured could not recover.

(*e*) Per Richardson, J., in *Truscott* v. *Christie* (1820), 2 Br. & B., p. 332; see also per Lawrence, J., in *Lucena* v. *Crauford* (1806), 2 B. & P. N. R., p. 303.

(*f*) *See* the *Copernicus* (1896), P. 154, 237.

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight."

Patrick v. *Eames* (1813), 3 Camp. 411,

was an action on a policy on the freight of the ship *Jane*, valued at £1000, at and from the ship's port of loading in all or any of the Cape de Verde Islands to Liverpool.

FACTS.—The intention of the assured was to load the vessel with orchella weed. It was expected that this would be supplied by the governor of the Cape de Verde Islands, and it was suggested that he had verbally undertaken to do so, but there was no evidence of any binding agreement. After the ship had taken in one hundred and fifty bags of orchella weed she was totally wrecked. It did not appear that there was any more orchella weed then ready to be put on board, but there were persons employed to pick and prepare what should have been a sufficient quantity to fill the ship.

Held that the assured could not recover except in respect of the one hundred and fifty bags which had been put on board.

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "If a contract had been proved for supplying this ship with a full cargo at a stipulated rate of freight, it would have been that by the event which has happened, the assured has been deprived of a profit which they must otherwise have certainly received; and they would have had a right to resort to the underwriters for a full indemnity. Nor should I have considered it material whether that contract was or was not under seal; or whether it was written or merely verbal. This circumstance only varies the mode of proof, without altering the principle on which the rights of the parties depend. But here no contract of any sort is proved for loading the ship. Beyond the one hundred and fifty bags of orchella weed actually on board, the interest of the assured was merely in expectation.

For anything that appears, Don Emanuel Martinus might have refused to send on board another bag, without subjecting himself to an action; and although the storm had never arisen, the ship might have been obliged to return to Liverpool nearly empty. The loss of freight which the assured now demand, therefore, did not necessarily arise from the event against which the underwriter undertook to indemnify them."

Although under ordinary circumstances no contractual relationship with regard to the goods to be carried arises until the goods are put on board, engagements of cargo may be booked in advance. In such cases, although an insurable interest in the freight eventually to be paid will, it is submitted, arise as soon as the cargo is engaged, the ordinary policy on freight will only cover such interest from the time that the assured may be said to have an inchoate right to the freight. It has been seen that in the case of chartered freight, that is to say, freight payable under a contract for the hire of a vessel or of space in a vessel or for the carriage of goods in a vessel which the shipowner undertakes to provide, an inchoate right is considered to arise as soon as the shipowner has done something towards carrying out his obligation. In the case of ordinary freight, that is to say, freight payable merely for the carriage of goods, an inchoate right, it would seem, arises as soon as the transportation is substantially ready to begin, namely, when the cargo is in readiness to be loaded and the vessel is ready to receive it. This appears to be the explanation of the two cases of *Tonge* v. *Watts* and *Montgomery* v. *Egginton*.

Tonge v. *Watts* (1746), 2 Strange, 1251,

was an action on a policy of insurance on ship and freight at and from Jamaica to Bristol.

Facts.—A cargo was ready to be put on board, but the ship being careening, in order for the voyage, a sudden tempest arose and she was lost. The rigging and parts of her were recovered and sold; and the defendant paid into Court as much as upon an average he was liable to for the loss of the ship, but the plaintiff insisted to be allowed £600 for the freight the ship would have earned in the voyage, if the accident had not happened.

Held that he could not recover, as the goods were not actually on board so as to make his right to freight commence.

Montgomery v. *Egginton* (1789), 3 Term. R. 362; 1 R. R. 718,

was an action on a policy on freight valued at £1500.

FACTS.—Only £500 worth of freight was on board when the ship was driven from her moorings and lost. But goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord KENYON, before whom the cause was tried, told the jury that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy, or whether it was a *bonâ fide* transaction; if the latter, the assured was entitled to recover for the whole value in the policy. The jury found a verdict for the plaintiff for the whole sum.

The case of *Tonge* v. *Watts* was cited at the trial, where it was held that, the ship being lost before the cargo was actually on board, although it was ready to be shipped, the assured, who had insured the freight as well as the ship, could not recover the former. The defendant obtained a rule to show cause why the verdict should not be set aside, but the Court, being strongly of opinion against him, he abandoned the rule, and it was accordingly discharged.

It has been seen (*g*) that the expression freight in insurance law includes the benefit derivable by a shipowner from the employment of his ship to carry his own goods, but as to when an insurable interest in this freight arises, there is little authority.

Devaux v. *l'Anson* (1839), 5 Bing. N. C. 519; 7 Scott, 507; 2 Arn. 82; 3 Jur. 678; 8 L. J. C. P. 284; 30 R. R. 786,

was an action on a policy on freight valued at £1000 by the ship *La France*, at and from Calcutta or any port on the Coromandel coast to any port or ports in Bourbon.

(*g*) *Ante*, p. 4.

FACTS.—The vessel arrived at Coringa, a port on the Coromandel coast, and had to put into dock for repairs. After the repairs had been completed and while preparations were being made for bringing the vessel out of dock, she was seriously damaged and was sold. The plaintiff, the owner of the vessel, had purchased a large quantity of goods for the return cargo, and these goods were lying ready for shipment in warehouses about seven miles from Coringa, but owing to the accident they had to be brought back in another vessel.

Held that the plaintiff was entitled to recover for the loss of freight.

JUDGMENT.—TINDAL, C.J.: "Two main and principal objections against the plaintiff's right to recover any loss on this policy have been raised and argued before us; viz. first, that under the facts stated in this special case, the policy on freight never attached; and secondly, that supposing the policy to have attached, there was no loss within the policy by any of the perils therein insured against.

"The first objection involves two distinct and separate heads of consideration; first, whether the interest of the assured in the subject-matter of insurance is properly described in the policy as freight; and secondly, if such description is sufficient in the policy, then, whether the interest of the assured in the subject-matter of insurance has commenced before the loss happened.

"But we consider the first question to be set at rest by the decision of the Court of B. R., in the case of *Flint* v. *Flemyng*, and hold it to be now established law, that the assured under an assurance upon freight, may recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured.

"The second head of inquiry may be subject to some degree of doubt and difficulty; but, upon the whole, we concur in opinion, that under the circumstances stated in the case, the interest of the assured had commenced, and the policy had attached at the time the loss took place.

"The argument which has been mainly relied upon on the part of the underwriters is this; that, in order to enable the

assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board, or ready to be put on board under a contract for that purpose; and in the latter case the ship must also be ready to receive the cargo; and in this case it is contended by the underwriters, that by reason of the loss of the ship before she was out of dock, and actually afloat, she was never in a condition or ready to receive the goods on board: the defendant relying on the expression used by Lord Ellenborough in giving the judgment of the Court of King's Bench in *Forbes* v. *Aspinall*, that in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be in a condition to receive the cargo. The proposition that the ship must be ready to receive her cargo, had, in that case, an immediate bearing and application to the facts then before the Court; for the policy was on freight upon the homeward voyage, and the homeward cargo was to be made by barter of the outward cargo, and the whole of the outward cargo had not been bartered at the time of the loss, part of it being still on board, so that it was impossible under those circumstances that the homeward cargo could be received on board the ship at the time of her loss. In that case, therefore, the loading of the homeward cargo on board, upon which depended the attaching of the policy, and the commencement of the right of the assured to the freight, was not prevented by any of the perils insured against by the policy, as the proximate and immediate cause of such prevention, but by a cause altogether without the risks included in the policy, namely, by the inability of the ship to receive the cargo on board, by reason of her being then partly loaded with the outward cargo: whereas in the case now before us, it appears that the ship was, on the 13th of August, quite ready to go to sea, and to receive the cargo on board, that nothing remained to prevent her sailing but the getting her out of dock, and that the loss of the ship and consequent inability to receive the cargo was occasioned solely by the endeavour to get her out of the dock, and afloat in the river. If, therefore, the loss of the ship in this case was occasioned by any of the perils within the meaning of the policy, the case is distinguishable from that of *Forbes* v. *Aspinall*, in this, that the immediate cause of prevention of taking the goods on board was not occasioned by the

inability of the ship to receive the cargo, but by the ship being disabled to receive the cargo, by one of the perils insured against. For, so far as relates to the cargo, we think it must be considered as in a sufficient state of readiness to be put on board: it was purchased by the assured for the express purpose of the adventure mentioned in the policy; it was comparatively useless for any other purpose; and the whole of the purchase was completed before the repairs were finished: and although it had been deposited in warehouses at seven miles distance, yet it was deposited there for the purpose of being put on board; and it is impracticable, as it appears to us, to lay down any precise rule as to the distance within which the cargo must be from the ship at the time of the loss, whether close to it, upon the quay, as in the case of *Flint* v. *Flemyng*, or at a more considerable distance, as in the present case. All that it seems necessary to determine with respect to the cargo, being, that it must have become the property of the parties insured, by a contract made with a view to its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board, when the ship arrives at the place of deposit."

This case decides that an insurable interest in freight of this description exists if there are goods belonging to the shipowner ready to be shipped, and the ship is ready to receive them, but there seems to be no reason why a shipowner, who has goods which he definitely intends to carry on his own vessel, should not be entitled to insure the freight in respect of them, although they are not ready to be put on board, and the ship is not ready to receive them. It will, however, be necessary to indicate in the policy the nature of the interest intended to be insured, as the ordinary policy on freight only covers this freight from the time that the carriage is substantially ready to begin.

Flint v. *Flemyng* (1830), Ll. & Wels. 257; 1 B. & Ad. 45; 8 L. J. (o. s.) K. B. 350; 35 R. R. 205,

was an action on a policy of insurance on freight by the ship *Hope*, at and from Madras to London.

FACTS.—The vessel arrived at Madras, and discharged her cargo with the exception of some heavy goods, which it would seem were kept as ballast. Before any of the homeward cargo was loaded, the vessel was wrecked. The defendant contended that the risk had not attached as the ship had not discharged her outward cargo. Lord TENTERDEN told the jury that as to that point, "the policy on freight could not attach till the ship was in a state to receive the homeward cargo." A general verdict was found for the plaintiffs, against which a rule *nisi* for a new trial was obtained. In the Court of King's Bench the point was again mentioned.

The ATTORNEY-GENERAL (Sir J. Scarlett): "But the ship was not shown to have been ready to take in her cargo, so as to make the risk on freight attach."

Lord TENTERDEN: "She could not part with all her outward cargo; it was necessary to keep some heavy goods for ballast."

The ATTORNEY-GENERAL: "She was lying in a harbour."

Lord TENTERDEN: "No, in open roads."

A shipowner may enter into contracts with a merchant—usually known as freight contracts—under which he undertakes to provide at some agreed date a ship or space in a ship without specifying any particular vessel. In such cases, it is submitted, an insurable interest arises as soon as the assured has definitely allocated a vessel to the performance of the contract. The point was raised in the American case of *New York and Cuba Mail Steamship Company* v. *Royal Exchange Assurance*. In this case cargo had been engaged at Havana by the plaintiffs for transportation by their line to New York, and the plaintiffs had intended to ship the goods by the *Vigilancia*. Owing to an accident to the vessel, the cargo could not be sent by the *Vigilancia*, but was sent by another vessel of the same line, and the freight for it was received. The Court held that the plaintiffs could not recover as they had not "by any overt act appropriated any part of the cargoes engaged to any particular vessel for transportation." (*h*) The use of the expression "overt act" suggests that the appropriation must be communicated, but it is submitted that this is not necessary, and that it is sufficient if it has been definitely decided upon. (*i*)

(*h*) (1907), 154 Fed. Rep., p. 319 (Am.).

(*i*) Cf. *Tasker* v. *Cunningham* (1819), 1 Bligh. 87; Arnould, sects. 385, 386.

The foregoing remarks have referred to the insurable interest of a shipowner. There are dicta in some of the early cases to the effect that freight, being an incident of the ownership of a vessel, a person who has no right either legal or equitable to a vessel, can have no insurable interest in the freight. There seems, however, to be no doubt that ownership of a vessel is not necessary in order to give an insurable interest in the freight.

A charterer has an insurable interest in his sub-freight, but there is some controversy as to the extent of his interest. "If the charterer by a sub-charter, or by carrying goods, will, the perils of the voyage excepted, realize earnings exceeding the amount of the charter-money which he has agreed to pay to the owner for the use of the ship, he has an insurable interest in the excess against all perils." (*k*) "In some cases the charterer may have an insurable interest in freight . . . at all events, for the excess by which such freight exceeds the sum he has engaged to pay the shipowner as charter-money." (*l*)

United States Shipping Company v. *Empress Assurance Corporation*, [1907] 1 K. B. 259; [1908] 1 K. B. 115; 76 L. J. K. B. 225; 12 Com. Cas. 142; 23 T. L. R. 137,

was an action on a policy of insurance on freight and/or chartered freight of the *Hero*, from July 30, 1901, to July 30, 1902.

FACTS.—The plaintiffs had chartered the *Hero* for twelve months at the rate of £900 per month, and the charterparty provided "that in the event of loss of time from stranding or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

(*k*) Phillips, Insurance, 3rd ed., sect. 337.

(*l*) Arnould, 2nd ed., p. 311. *See* also Parsons on Insurance, p. 175. In *Mellen* v. *National Insurance Co.* (1829), 1 Hall N.Y. 452 (Am.), JONES, C.J. said: "What would be the rule in the case of a surplus, whether such excess would be held an insurable interest in the charterer, or not, and whether if insurable, it would be covered by a general policy on freight *eo nomine*, or would require a disclosure and specification of the nature of the interest, are questions which we deem it unnecessary in this case to agitate, for here there was no surplus."

In *Clark* v. *Ocean Insurance Co.* (1835), 16 Pick. 289 (Am.), the Court held that the charterer had an insurable interest in the excess freight, and that such interest was properly described as freight.

The plaintiffs as chartered owners of the *Hero*, entered into a charterparty with an American railway company for the carriage of a cargo of coal from Baltimore to Colon. A cargo of 3197 tons of coal was shipped, and on December 24, 1901, the *Hero* arrived at Colon, and the discharge of her cargo was begun. On December 31, 2298 tons of the cargo then having been discharged, the vessel stranded through perils of the seas and became a constructive total loss. That part of the cargo which had not been discharged was lost, and there was a total loss of freight in respect thereof. The defendants contended that £54 should be deducted from the plaintiffs' claim on the ground that it would have taken two days to discharge the cargo which was still on board when the vessel stranded.

Held that the hire saved could not be deducted from the claim for freight lost.

JUDGMENT.—CHANNELL, J.: "With regard to the defendants' contention that the amount of two days' hire, £54, must be deducted from the claim, there are no decisions of the Courts here upon the point, but it does appear that some trustworthy text-writers take the view that, where a charterer loses freight by reason of perils of the sea and by the same event is saved payment in the way of hire, then, notwithstanding the rule as to gross freight, the amount of hire which has been saved may be deducted; and if the question is looked at logically and as a matter of principle, that is clearly right, because insurance is only an indemnity. But in any case the result of the rule as to gross freight, which is a well-established rule, is that the assured gets more than an indemnity, because he must always save something in the way of expenses. I rather gather that the rule has arisen owing to the difficulty of taking the account. If the principle of indemnity were carefully adhered to, an account would have to be taken in every case showing exactly what had been lost and exactly what had been saved, and the account would be an extremely difficult one to take; and to get rid of that difficulty, the rule has been adopted that an insurance on freight is to be an insurance, not upon the net amount, but on the gross amount of freight receivable. That being the rule

the defendants are not in my opinion entitled to say that, although the plaintiffs have lost a certain amount of freight, they have by the same cause been saved the cost of two days' hire which would have been incurred if the cargo had not been lost. That is, in effect, asking that an account should be taken, but the rule shows that that is not to be done."

This case is authority for the proposition that a charterer has an insurable interest in the gross amount of freight at his risk, and this is in accordance with the Marine Insurance Act, which provides, "In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance," (*m*) without drawing any distinction between the case of a shipowner and a charterer. The charterer stands *pro hac vice* in the position of a shipowner, and the principles applicable in the case of the shipowner apply in the case of a charterer. He can insure the benefit he will derive from the employment of the vessel, whether that benefit is to accrue from a sub-charter or from the price paid to him for carrying the goods of others, or perhaps from the additional value conferred on his own goods by the carriage. (*n*)

In the event of a loss of freight the charterer can only recover to the extent that he had freight at risk at the time of the loss. Thus, under the form of charterparty in frequent use, the charterer undertakes to load a full and complete cargo to be carried on the agreed voyage at a stipulated rate of freight. The charterer may procure the cargo from other persons and may arrange with the shippers for a different rate of freight to that which he has agreed to pay under the charterparty, but to the extent that the freight on the goods thus loaded is used to liquidate his liability, the amount at his risk is diminished and accordingly his right to recover in case of loss. A charterer who wishes only to insure the surplus of the freight which he expects to receive over the freight which he will have to pay, can do so by a policy "on profits of charter." (*o*)

(*m*) Sect. 16, sub-sect. (2).

(*n*) *See* Arnould, sect. 262; Phillips, 3rd ed., sect. 337; *Clark* v. *Ocean Insurance Co.* (1835), 16 Pick., p. 296 (Am.); *contra Mellen* v. *National Insurance Co.* (1829), 1 Hall N. Y. 452 (Am.).

(*o*) *Asfar* v. *Blundell*, [1896] 1 Q. B. 123.

Under ordinary circumstances the charterer has no insurable interest in the freight he has to pay, because the risk of that freight is usually upon the owner. (*p*) But he may have an insurable interest in respect of his liability to pay full freight although the goods arrive damaged,(*q*) or in respect of his liability to pay a lump sum freight although a large part of the cargo may be lost by perils of the sea,(*r*) or if he agrees to pay dead freight in the event of the ship being prevented from discharging the outward and shipping a return cargo. (*s*)

An assignee has an insurable interest in the freight assigned to him. "It is usual to assign the freight without the ship; and the assignee insures for his own interest. Actions have been frequently brought upon insurances of the freight and the ship; in which the owners were distinct persons." (*t*) In an American case (*u*) the Court expressed the view that the plaintiffs, to whom freight had been assigned, must be "considered as having an insurable interest in the freight," and in the case of *Wilson* v. *Martin* (*x*) the assured, who was in the position of an equitable assignee of the freight, was held to have an insurable interest in the freight.

A mortgagee, to whom freight has been mortgaged, has an insurable interest in the freight. "The plaintiff had mortgaged his interest in the goods and freight to the defendant; and therefore although the defendant may have insured the legal interest on his own account, he might also have insured the equitable interest remaining in the plaintiff on the plaintiff's account." (*y*) While there is no doubt that a mortgagee may insure, considerable doubt exists as to the extent to which he may insure. According to the

(*p*) *Cheriot* v. *Barker* (1807), 2 Johns. Rep. 346 (Am.); *Clark* v. *Ocean Insurance Co.* (1835), 16 Pick., p. 293 (Am.).

(*q*) *See* Arnould, sect. 232. This may be insured as "contingency freight," *Kung* v. *Methuen* (1907), 24 T. L. R. 145.

(*r*) Per Lord LINDLEY in *Williams* v. *Canton Insurance Office, Ltd.*, [1901] A. C., p. 472; see also per Lord ESHER, M.R., in the *Bedouin* (1894), P. 11.

(*s*) *Puller* v. *Staniforth* (1809), 11 East. 232; *Puller* v. *Glover* (1810), 12 East. 124; *Puller* v. *Halliday* (1810), 12 East. 494.

(*t*) Per Lord ELDON, L.C., in *Mestaer* v. *Gillespie* (1806), 11 Vesey, p. 629.

(*u*) *Paradise* v. *Sun Mutual Insurance Co.* (1851), 6 Lou. Ann. 596 (Am.).

(*x*) (1856), 11 Exch. 684; *see* also *Lindsay* v. *Gibbs* (1856), 22 Beav. 522; 2 Jur. N. S. 1039.

(*y*) Per ASHURST, J., in *Smith* v. *Lascelles* (1788), 2 T. R., p. 188.

Marine Insurance Act, "the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage," (*z*) and the language of this section at first sight suggests that the extent to which a mortgagee may insure is limited to the amount of the mortgage debt. But there is considerable authority to the effect that a mortgagee, whether legal or equitable, may insure the mortgaged property to its full value (although the full value exceeds the amount of the mortgage debt) and may under certain circumstances recover the full value of the mortgaged property. "I think the plaintiff (who was a mortgagee) might have effected an insurance to the whole value, but I also think that whether he intended to insure only his own interest or that of the mortgagor as well was a question very properly left to the jury." (*a*) "The question, then, as to the amount recoverable under an open policy effected by a mortgagee, will, in all cases, depend upon the intention in point of fact of the mortgagee in effecting the policy; if he intended it to cover the whole interest, both legal and equitable, he may then recover the whole amount of the insurance, under trust as to the surplus, to hold it for the mortgagor; if he intended it only to cover his own interest as mortgagee, and the amount of the insurance is greater than that of the mortgage debt, he can recover to the extent only of his lien." (*b*) Different reasons have been given for this right of a mortgagee to insure to the full value. It is sometimes attributed to his legal title, and there is authority for saying that a legal title to property confers a right to insure the property to the full value. (*c*) It is sometimes attributed to his being in possession, and there is authority for saying that possession confers a right to insure to the full value.(*d*) But the

(*z*) Sect. 14, sub-sect. 1.

(*a*) Per LITTLEDALE, J., in *Irving* v. *Richardson* (1831), 9 L. J. (o. s.) K. B., p. 226.

(*b*) Arnould, 2nd ed., p. 306; *see* also *North British Insurance Co.* v. *London Insurance Co.* (1877), 5 Ch. D., p. 583; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P., p. 608; *Castellain* v. *Preston* (1881), 11 Q. B. D., p. 398; *Nichols & Co.* v. *Scottish Union Insurance Co.* (1885), 14 Rettie, 1094; 2 T. L. R. 190; *Glasgow Provident Investment Society* v. *Westminster Fire Office* (1887), 14 Rettie, p. 977.

(*c*) *Lucena* v. *Craufurd* (1806), 2 B. & P. N. R., p. 324; *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P., p. 638; MacGillivray, Insurance, p. 130.

(*d*) *De Forrest* v. *Fulton Fire Insurance Co.* (1828), 1 Hall. N. Y. 84 (Am.); *Waters* v. *Monarch Life Insurance Co.* (1856), 25 L. J. Q. B. 102; *L. & N. W. Railway Co.* v. *Glyn* (1859), 28 L. J. Q. B. 188; MacGillivray, Insurance, pp. 130, 131.

true view seems to be that a mortgagee, like other persons with a limited linterest,(*e*) may insure the property to its full value. "A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit." (*f*) The whole question is discussed at great length by BOWEN, L.J., in the case of *Castellain* v. *Preston*. "It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time when the insurance is effected. He cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Let us take a few of the cases which are most commonly known in commerce of persons who insure. There are persons who have a limited interest, and yet who insure for more than a limited interest, who insure for the total value of the subject-matter. There is the case, which is, I suppose, the most common, of carriers and wharfingers and commercial agents, who have an interest in the adventure. It is well known what their rights are. Then, to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a

(*e*) In *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596, KEATING and BRETT, JJ., while leaving open the question whether this right extended to an equitable interest, held, contrary to the view of the other members of the Court, that it did not apply to an interest which was based merely on contract.

(*f*) Marine Insurance Act, sect. 14 (2).

loss hold the amount to which he has been damnified. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he has intended to cover." (*g*)

A mortgagor has an insurable interest in the full value of the property mortgaged (*h*) even though it be mortgaged to its full value, because in case of loss he would not only be deprived of the property, but would also remain liable for the mortgage debt.(*i*) When the mortgagor has convenanted to insure the mortgaged property on account of the mortgagee, he holds the proceeds in trust for him. (*k*)

A vendor of a ship who reserves his right to the freight being earned at the time is in a position similar to that of an assignee of freight, and may insure the freight. (*l*)

With regard to advance freight, the mere advancing of the freight will not give the person making the advance any insurable interest. "In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss." (*m*) Such money cannot, in case of the loss of the ship or cargo, be recovered back, and the person making the payment runs the risk of losing the benefit which he expected to derive from the payment. In every case the question to be considered is whether the payment is a payment on account of freight, or merely a loan repayable by the shipowner. "The only question is whether this was a mere loan, or an advance of freight. A sum of £300 is to be advanced, subject to certain deductions, one of which is for

(*g*) Per Bowen, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D., p. 398.

(*h*) Marine Insurance Act, sect. 14 (1).

(*i*) *Alston* v. *Campbell* (1779), 4 Bro. Parl. Cas. 476; *Ward* v. *Beck* (1863), 13 C. B. (N. S.) 668.

(*k*) *Ladbroke* v. *Lee* (1850), 4 De G. & Sm. 106; *Swan* v. *Maritime Insurance Co.*, [1907] 1 K. B. 116; cf. *Lery* v. *Merchants Marine Insurance Co.* (1885), 52 L. T. 263.

(*l*) *See* Arnould, sect. 262; Crump, Marine Insurance, p. 120; Phillips, 3rd ed., sect. 480. The case of *Riley* v. *Delafield* (1811), 7 Johns. 522 (Am.), did not decide that a vendor under such circumstances had no insurable interest, but that he could not recover under a policy in which the subject-matter was described as freight.

(*m*) Marine Insurance Act, sect. 12; Arnould, sect. 263; Phillips, sect. 340.

insurance. If it is to be insured, it must be for freight in advance; for a mere loan could not be insured; and if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." (*n*)

Where the advance is to be made in accordance with the provisions of the contract of affreightment, the question, whether the advance is on account of freight or not, is a question of construction, and the intention of the parties must be gathered from the whole charterparty. If the advance is made without previous stipulation, the intention must be gathered from the agreement or the conduct of the parties at the time of making it. (*o*)

Manfield & Another v. *Maitland* (1821), 4 B. & Ald. 582; 23 R. R. 402,

was an action on a policy to insure an acceptance of £219.

FACTS.—A charterparty had been made, which provided that one-half of the freight should be paid in cash on unloading and right delivery of the cargo, and the remainder by bill on London at four months' date, the captain to be supplied with cash for the ship's use. In pursuance of this last stipulation, the captain drew the bill of exchange in question for £219, for the use of the ship *Agenoria* on the plaintiffs, and it was duly accepted and paid. The vessel was lost on the homeward voyage.

Held that "this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, and that the freighter had no insurable interest in such bill."

JUDGMENT.—BAYLEY, J.: "If the memorandum of charterparty in this instance had clearly expressed that the money advanced should be in part payment of the freight, then it would follow, that the loss of the ship would produce a loss of the money advanced to the freighter, and he would have an insurable

(*n*) Per Lord CAMPBELL in *Hicks* v. *Shield* (1857), 7 E. & B., p. 638; *see* also *Wilson* v. *Martin* (1856), 11 Exch. 684; *Hall* v. *Janson* (1855), 4 E. & B. 500; *Frayes* v. *Worms* (1865), 19 C. B. (N. S.) p. 177; *Allison* v. *Bristol Marine Insurance* (1876), 1 A. C. 209; *The Red Sea* (1896), P. 20; *Weir* v. *Girvin*, [1900] 1 K. B. 45.

(*o*) Carver, Carriage by Sea, 5th ed., sect. 564; *The Karnak* (1869), L. R. 2 P. C. 505.

interest in it. But, if that be not so, and it be only a loan by the freighter, he would have no insurable interest, having a remedy against the owner for the debt."

Currie v. *The Bombay Native Insurance Company* (1869), L. R. 3 P. C. 72; 6 Moo. P. C. N. S. 302; 39 L. T. P. C. 1; 22 L. T. 317; 18 W. R. 296,

was an action on a policy of insurance upon disbursements of the ship *Northland*, upon a voyage from Moulmein to Madras, against total loss only.

Facts.—The disbursements consisted of advances made by the charterer to the captain of the vessel to be paid out of freight, which would not be earned except by the arrival of the vessel at Madras.

Held that the sums borrowed by the captain to be repaid by deductions from the freight, must be considered as advances of freight, and that the charterer had, therefore, an insurable interest.

CHAPTER III.

The Duration of the Risk Covered by the Policy.

In the preceding chapter it has been seen that an ordinary policy on freight has always been regarded as a contract of indemnity during the adventure in which the freight was to be earned. From the time that the freight began to be earned, an inchoate right to it was said to arise, and from this time according to the American view there was an inception of an insurable interest in the freight, and according to the view adopted in several early English cases there was an inception of the risk. It is, however, misleading to treat the inchoate right as referring either to the inception of an insurable interest in the freight or to the inception of the risk under the policy. The ordinary policy on freight was not intended to cover any freight which the assured might have engaged. In the absence of indication to the contrary, it was an insurance of the freight which was being earned. Until something had been done towards earning the freight, the policy did not attach, and it did not attach because until then the freight did not come within the scope of the policy.

It has also been seen that at different times different tests have been suggested as to the time when, in the case of chartered freight, the policy attached. According to one view the policy did not attach until the vessel had broken ground on the voyage. (*a*) According to another view it did not attach until the vessel was ready to take the cargo on board. (*b*) According to the cases of *Thompson* v. *Taylor* and *Truscott* v. *Christie*, the test was whether something had been done under the contract of affreightment. (*c*) The decision in the case of *Barber* v. *Fleming* (*d*) showed that these tests were merely criteria as to whether the freight had in fact begun to be earned and was therefore within the scope of the policy, and were not artificial

(*a*) *See ante*, p. 23. (*b*) *See ante*, p. 30. (*c*) *See ante*, p. 24.
(*d*) (1869), L. R. 5 Q. B. 59, *ante*, p. 32.

limitations upon the commencement of the risk. Provided that the assured had freight which came within the scope of the policy, the risk could attach at once, and was not subject to any implied condition that something must have been done under the contract of affreightment, or that the vessel must be ready to load, or have broken ground on the voyage. The Marine Insurance Act, therefore, provides that "Where chartered freight is insured at and from a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety." (*e*)

In policies on chartered freight, as in all other policies, the commencement of the risk may be made to depend on a certain event, and in such cases the risk does not attach until the happening of the event.(*f*)

Gordon & Talbot v. *The American Insurance Company of New York* (1847), 4 Denio. 360 (Am.),

was an action on a policy of insurance at and from Canton to a port of discharge in the United States "upon the freight of all kinds of lawful goods and merchandize, laden or to be laden on board the good ship called the *America* . . . beginning the adventure upon the said freight, from and immediately following the loading thereof on board of the said vessel."

In the declaration the plaintiffs averred that they had entered into contracts of affreightment with two commercial houses at Canton, and that the vessel at the time of the loss was ready to receive the goods and the goods were ready to be laden, but there was no averment that any goods had been laden on board. The defendants demurred.

Held, that the plaintiffs could not recover, as the risk did not commence until the goods were on board.

(*e*) Rules for Construction of Policy, Rule 3 (*c*). This rule is similar to the rule relating to the inception of the risk on ship.

(*f*) In addition to the cases which are set out in the following pages, *see* also *Barnes* v. *Akers* (1795), 2 Peake, 22.

Beckett v. *The West of England Marine Insurance Co., Ltd.* (1872), 25 L. T. 739 ; 1 Asp. M. C. 185,

was an action on a policy of insurance for £300 upon freight valued at £300 of the ship or vessel called the *Gem*, at and from Lagos to any port of call and/or discharge in the United Kingdom. The policy also contained the following printed clause : "And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid, from the loading the said goods or merchandise on board the said ship or vessel as at above, and continue until the goods or merchandise be discharged and safely landed as at above."

FACTS.—A charterparty had been made under which the vessel was to proceed with cargo to any place on the West Coast of Africa and to bring back a homeward cargo of African produce. The freight was a lump sum freight of £600, of which £300 had been paid in advance.

The vessel arrived at Lagos, and discharged the outward cargo, but before any of the homeward cargo was put on board the vessel was wrecked.

Held that as none of the homeward cargo had been loaded, the plaintiffs could not recover.

Jones & Another v. *The Neptune Marine Insurance Company* (1872), L. R. 7 Q. B. 702 ; 41 L. J. Q. B. 370 ; 27 L. T. 308 ; 1 Asp. M. C. 416,

was an action on a policy of re-insurance for £500 upon the freight of the vessel *Napier*, from Baker's Island to a port of call and/or discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored as above at a safe anchorage.

FACTS.—The vessel had been chartered to proceed to Baker's Island in the Pacific Ocean, there to load a cargo of guano, and to discharge it at Birkenhead, freight to be at the rate of seventy

shillings per ton. The vessel arrived at Baker's Island and loaded about two-thirds of her cargo (a full cargo being ready), but was obliged to leave her moorings owing to stress of weather and was wrecked.

The plaintiffs had underwritten a policy "on £500 lost or not lost at and from Melbourne to Baker's Island, while there, and thence to Liverpool or Birkenhead, upon chartered freight valued at £6000," and having paid £500 upon their policy, sought to recover it from the defendants.

Held that they could not recover, by BLACKBURN, J., on the ground that the policy being from Baker's Island, the risk had not attached; by MELLOR and LUSH, J.J., on the ground that the risk did not attach until the loading was completed.

Hopper & Another v. *Wear Marine Insurance Company* (1882), 46 L. T. 107; 4 Asp. M. C. 482,

was an action on a policy of insurance upon freight of and in the vessel *Hawthorn*, at and from Libau to Bordeaux, beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau.

FACTS.—The vessel which had been chartered to carry a cargo of oats from Libau to Bordeaux arrived at Libau and commenced to load. A portion of the cargo, which was in lighters alongside the vessel, was lost and the plaintiffs could not obtain other cargo except at a lower rate of freight than that stipulated for in the charterparty. The present action was brought to recover the difference. On demurrer,

Held that the plaintiffs could not recover.

The *Copernicus*, [1896] P. 237; 65 L. J. ADM. 108; 74 L. T. 757; 8 Asp. M. C. 166,

was an action on a policy of insurance on "freight and/or charges as interest may appear by steamer and/or steamers at and from any port or ports of loading on the West Coast of South America to any port or ports of discharge in the United Kingdom, to

cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker."

FACTS.—The *Copernicus* sailed from Monte Video for Valparaiso for the purpose of loading cargo which had been engaged at Valparaiso and at other ports on the West Coast, and which was ready for shipment, but on the voyage to Valparaiso the vessel was lost.

Held that the engagement clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived at her first loading port on the West Coast of South America, the risk had not attached.

In most of the foregoing cases the question arose in connection with a printed clause, which is found in many policies, to the effect that the risk on freight is not to commence "until the goods are loaded on board the said ship or vessel as at above." The provisions of such a clause, however, may have no application to the facts, as for instance in the case of a shipowner who has chartered his vessel to proceed from A. to B., there to load a cargo, and has effected an insurance on freight "at and from A. to B.," by a policy containing such a clause. In such a case the clause would have no application, and should, it is submitted, be ignored. (*g*) This seems to have been the view put forward by Lord ESHER in the case of *Hydarnes S.S. Co.* v. *Indemnity Mutual Marine Assurance Co.*, (*h*) where the policy was on freight of meat "at and from Monte Video." "If this were a case of insurance on freight that could be earned in respect of goods or merchandize to be loaded at Monte Video, the case of *Beckett* v. *West of England Marine Insurance Co.* seems to show that in construing the policy the words relied on by the defendants must be left in; but in this case we cannot leave them in, I think, because they are altogether inapplicable, the insurance being on frozen meat, and Monte Video not being the port of loading for frozen meat."

(*g*) The effect of such a clause can be avoided by taking a policy on "freight on board or not on board."

(*h*) [1895] 1 Q. B., p. 506.

Hydarnes Steamship Company v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500; 64 L. J. Q. B. 353; 72 L. T. 103; 14 R. 216; 7 Asp. M. C. 553,

was an action on a policy of insurance upon freight of meat valued at £3000 against loss occasioned by breaking down of machinery until final sailing of vessel, at and from Monte Video to any ports or places in the River Plate (including the Boca) and thence to any port in the United Kingdom. The policy also contained a printed clause: "The assurance aforesaid shall commence upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video, and shall continue until the said goods or merchandise be discharged and safely landed at as aforesaid." The words "Monte Video" and "as aforesaid" were inserted in writing.

Facts.—The freight insured arose under a contract between the plaintiffs and certain merchants for the carriage of a cargo of frozen meat from Boca, Buenos Ayres, to the United Kingdom. The vessel proceeded from Monte Video to the Boca, Buenos Ayres, but owing to a breakdown of the refrigerating machinery no meat could be put on board.

At the time when the policy was entered into no meat ever was or could be loaded at Monte Video, there being no appliances there for freezing meat, and this fact was known to the defendants.

Held that the words in the printed clause defining the commencement of the risk with regard to the loading of the goods being absolutely inapplicable under the circumstances of the case, they must be rejected, and the policy, therefore, attached although no meat had been loaded on board the ship.

Different rules with regard to the inception of the risk apply in the case of ordinary freight, that is to say, freight payable merely for the carriage of particular goods. "Where freight, other than chartered freight, is payable without special conditions and is insured at and from a particular place, the risk attaches *pro rata* as the goods

or merchandise are shipped: provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo." (*i*) The rule that in the case of freight payable for the carriage of goods the risk only attaches as the goods are put on board may be traced to the fact, that in the majority of cases no right to any freight exists until the goods are put on board. But the case of *Devaux* v. *l'Anson* (*k*) decided that, in the case of freight to be derived by the shipowner from the carriage of his own goods, the policy attached as soon as the carriage was substantially ready to begin, that is to say, as soon as the cargo was in readiness and the ship was ready to receive it. The Act accordingly contains a proviso to this effect, and provides that the same rule shall apply to freight to be derived from the carriage of the goods of others. It must, however, be freight, and not a mere expectation of obtaining freight; it must be freight to be derived from the carriage of goods which some person has contracted to ship.

The Act substantially reproduces the language used in the text books and by TINDAL, C.J., in the case of *Devaux* v. *l'Anson*. "In order to enable the assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board, or ready to be put on board under a contract for that purpose; and in the latter case the ship must also be ready to receive the cargo." "In an insurance on freight properly so called, the risk begins from the time when the goods are put on board, or contracted for under a binding contract and ready to be put on board a ship in a state of readiness to receive them." (*l*) It must, however, be noted that several of the cases (*m*) relied on in the text-books do not justify the conclusions which have been drawn from them. Thus in the case of *Truscott* v. *Christie*, although a portion of the cargo had been put on board, there is nothing to show that the balance was in readiness. In the case of *Parke* v. *Hebson* there is no evidence that the goods, other than those already loaded, were ready, and the ship was not ready to receive

(*i*) Marine Insurance Act, 1906. Rules for Construction of Policy, rule 3 (*d*).

(*k*) (1839), 5 Bing. N. C. 519, *ante*, p 49.

(*l*) Marshall, 4th ed., p. 218; Arnould, 2nd ed., p. 524; Park, 8th ed., p. 56.

(*m*) *Tonge* v. *Watts* (1746), 2 Str. 1251; *Montgomery* v. *Egginton* (1789), 3 T. R. 362; *Truscott* v. *Christie* (1820), 2 Br. & B. 320; *Parke* v. *Hebson*, 2 Br. & B. 320; *Warre* v. *Miller* (1825), 4 B. & C. 538; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *Devaux* v. *l'Anson* (1839), 5 Bing. N. C. 519.

them. In the case of *Warre* v. *Miller* there was an averment in the declaration to the effect that the goods were ready to be loaded, but at *nisi prius* no reliance was placed on this, or on the fact that the vessel was not ready to receive them. Besides, it would seem that in these cases the freight insured was chartered freight, and was so regarded by the Courts.

The Act speaks of the goods "being in readiness," and the ship "ready to receive them." These expressions should, it is submitted, receive the same construction as they have received in the law of shipping. The cargo must be in readiness, but that does not necessarily mean that the cargo must be on the quay at which the ship is to be loaded, although this will generally be the case. If goods are usually stored at a place at a distance from the spot at which the loading is done, it will suffice if the cargo is in readiness at that place. (*n*) This seems to have been the view adopted in *Devaux* v. *l'Anson*, (*o*) where the cargo was lying in warehouses about seven miles from the quay.

The ship must be ready to receive the cargo, but this does not necessarily mean that the vessel must be at the berth where the cargo is to be loaded. In *Devaux* v. *l'Anson* the vessel had been sent to dry dock for repairs and was still in dry dock at the time of the accident, but it was held that she was ready to receive the cargo. "It appears that the ship was, on the 14th of August, quite ready to go to sea, and to receive the cargo on board, that nothing remained to prevent her sailing but the getting her out of dock, and that the loss of the ship and the consequent inability to receive the cargo was occasioned solely by the endeavour to get her out of the dock and afloat in the river." This decision suggests that a vessel may be "ready to receive" the cargo although she is not at the berth where the cargo is to be loaded. This was the interpretation put upon these words in the case of *Hick* v. *Tweedy*,(*p*) where a charterparty contained a clause entitling the charterers to cancel if the vessel was not ready to receive cargo by December 12. The vessel arrived

(*n*) Carver, Carriage by Sea, 5th ed., § 252. *See Hudson* v. *Ede* (1868), L. R. 2 Q. B. 566; 3 Q. B. 412; *Grant* v. *Coverdale* (1884), L. R. 9 A. C., p. 477; *Allerton Sailing Ship Co.* v. *Falk* (1888), 6 Asp. M. C. 287; *Smith* v. *Rosario Co.*, [1894] 1 Q. B. 174.

(*o*) (1839), 5 Bing. N. C. 519.

(*p*) (1890), 63 L. T. 765; 7 T. L. R. 144.

at Odessa, the port of loading, on December 10 in ballast, but owing to the crowded state of the port could not secure a loading berth before the 18th. The charterers cancelled the charterparty on the ground that the vessel was not ready to receive the cargo, but it was held that they were not entitled to do so, as the words merely referred to the condition of the ship. (*q*)

With regard to the termination of the risk on freight, the rule generally laid down is that the risk terminates at the same time as the risk terminates on goods. "The ordinary policy provides that the insurance on a vessel shall end after she has been moored twenty-four hours in good safety, and on goods when they are safely landed. Though this policy is commonly used for freight insurances there is no clause determining the end of the risk on freight. Usually the freight is not payable until the goods are delivered. When this is so, it is submitted that, under a voyage policy to the place of discharge, the risk continues as long as the goods remain in the custody of the shipowner exposed to maritime perils, provided there be no unjustifiable delay in discharging them." (*r*)

In the case of *Atty* v. *Lindo*, (*s*) where the freight of a voyage from London to Madeira and Jamaica was agreed to be paid in wine to be put on board at Madeira and to be carried free to Jamaica, the Court of Common Pleas were of opinion that the risk under a policy on freight at and from London to Jamaica endured until the wine was safely carried to Jamaica.

If the *locus ad quem* referred to in the policy is not the place of discharge of the cargo, the risk under an ordinary policy on freight probably terminates when the ship has safely arrived at the agreed port of destination and is at her moorings. (*t*) In the case of *Phillips* v. *Campion* the underwriter contended that the risk terminated when any part of the cargo which was the produce of the voyage insured arrived safely at its destination, but GIBBS, C.J., characterised this as a mere fancy of the imagination.

(*q*) *See* also per KENNEDY, L.J., in *Leonis S.S. Co.* v. *Rank*, [1908] 1 K. B., p. 527; Carver, Carriage by Sea, 5th ed., sect. 221.

(*r*) Arnould, sect. 520; McArthur, Marine Insurance, p. 100; Marshall, 4th ed., p. 225; Chalmers and Owen's Digest, 2nd ed., p. 154.

(*s*) (1805), 1 B. & P. N. R. 236.

(*t*) *See* Arnould, sect. 493; Phillips, sect. 969; per BRAMWELL, B., in *Stone* v. *Marine Insurance Co. of Gothenburg* (1876), L. R. 1 Ex. D., p. 85.

Phillips v. *Campion* (1815), 1 Marsh. R. 402 ; 6 Taunt. 3,

was an action on a policy on the freight of the ship *Active*, at and from London to the Southern Whale and Seal fishery, during her stay there, and at and thence to London.

FACTS.—While at the fishery the vessel and some twelve hundred seal skins were damaged by a peril of the sea. It was in evidence that if any of the damaged skins had been stowed with sound ones, they would have infected and damaged the latter, and they were therefore sent home by another vessel and arrived safely. Subsequently the *Active* was lost. The defendant relied on the fact that some of the produce of the adventure had been shipped to England and had arrived and produced a small profit, as a criterion that the voyage was terminated, and that he was therefore not liable for the subsequent loss. The jury found a verdict for the plaintiff, and the Court of Common Pleas refused a rule to set it aside.

The policy does not attach if the vessel was not seaworthy at the commencement of the voyage, (*u*) or if the vessel sails on a voyage different from the voyage insured. (*x*)

Freight may be insured by a time policy, but this, it is submitted, does not affect the view that the freight intended to be covered is the freight which the shipowner is in the course of earning. The difference between a time policy and a voyage policy is that in the one case the duration of the risk is limited by time and in the other by space,(*y*) but this does not affect the nature of the insurance. In one case it was argued that a loss of freight could not be recovered because the voyage, on which the freight was to be earned, could not have been completed within the time covered by the policy. But this contention was not accepted. Freight may be insured for part of a voyage, and in the same way it may be insured for a portion of the period during which it is at risk.

(*u*) *Donnally* v. *Merchants Mutual Marine Insurance Co.* (1876), 28 Lou. Ann. 939 ; 26 Am. Rep. 129 (Am.) ; *Dodge* v. *Boston Marine Insurance* (1892), 85 Maine, 215 (Am.) ; per BRETT, J., in *Daniels* v. *Harris* (1874), L. R. 10 C. P., p. 5.

(*x*) *Sellar* v. *M'Vicar* (1804), 1 B. & P. N. R. 23.

(*y*) *See* per Lord CAMPBELL, C.J., in *Knight* v. *Faith* (1850), 15 Q. B., p. 652.

Michael v. *Gillespy* (1857), 2 C. B. (N. S.) 627; 26 L. J. C. P. 306; 3 Jur. (N. S.) 1219; 109 R. R. 809,

was an action on a policy of insurance on cargo and freight of the *Charles Kerr* from January 24, 1852, until March 1, 1852, with a proviso for its renewal from time to time for a year.

FACTS.—The vessel on January 25, 1852, sailed from Shields with a cargo of coals for Aden, where she could not have arrived until long after March 1. Owing to bad weather, the vessel was compelled on February 8 to put into Cuxhaven for repairs, and the coals had to be unloaded. When unloaded they were found to be so damaged that it would have been extremely dangerous, owing to their liability to spontaneous ignition, to carry them on, and it was proved that owing to want of facilities at Cuxhaven, it would have cost more than three times their value at Aden to put them in a condition to be carried on. The owner of the coals thereupon abandoned them to the underwriters as a total loss, and the vessel, after being repaired, proceeded upon another voyage.

On the part of the defendant it was objected, first that there was no loss of the subject-matter of the insurance, because, even if no accident had occurred, the vessel would not have arrived at Aden within the period covered by the policy, and would not have earned any freight during the currency of the policy; and secondly, that although by a peril insured against the coals were in such a condition that it would cost more than their value to make it safe to carry them to their destination, yet, inasmuch as it was not physically impossible to carry them on, there was no total loss of freight.

Held that the plaintiff could recover.

An assured who has insured freight by a time policy may, it is submitted, recover for a loss of freight caused by perils insured against and sustained during the period covered by the policy, although the loss is not ascertained until the period covered by the policy has expired. "I may observe that it is in my mind quite immaterial that before these things happened the policy, which was a time policy,

had run out by efflux of time. If the vessel was lost whilst the time was running, or if the injury was sustained then, it may very well be proved by evidence subsequent to the date of the policy having expired. The question was, was there while the policy was current a loss such as to make the underwriters responsible for it." (*z*) In the case of *Rankin* v. *Potter*, (*a*) where homeward chartered freight was insured during the outward voyage, and the vessel was so seriously damaged during the outward voyage as to be unable to proceed under the charterparty, the assured was held entitled to recover, although the damage to the vessel was not discovered until after the expiration of the policy. In *Rankin* v. *Potter* the policy was a voyage and not a time policy, but no distinction in the principle to be applied can be drawn on that account. In the one case the duration of the risk is limited by time, and in the other by space.(*b*)

An assured cannot, however, recover for a loss which, although attributable to damage inflicted by perils insured against during the period covered by the policy, is not sustained until after the period covered by the policy has expired.

Hough v. *Head* (1885), 53 L. T. 809 ; 55 L. J. Q. B. 43 ; 34 W. R. 160 ; 5 Asp. M. C. 505.

was an action on a policy of insurance for £1200 on chartered freight at and from and for and during the space of six calendar months from April 15 to October 14, 1881, both days inclusive, " to pay only loss of hire not exceeding £2000 which may arise in clause 6 of the charterparty for accidents occurring between April 15 and October 15, but free of claim arising from deficiency of men."

FACTS.—The plaintiffs, who were the owners of the S.S. *Presnitz*, by a charterparty chartered the vessel for a period of six months, hire being payable monthly in advance. Clause 6 of the charterparty provided that " In the event of loss of time by deficiency of men, collision, breakdown of engines and the vessel becoming

(*z*) Per Lord BLACKBURN in *Shepherd* v. *Henderson* (1881), L. R. 7 A. C., p. 67 : *see* also per Lord CAMPBELL in *Knight* v. *Faith* (1850), 15 Q. B., p. 667.

(*a*) (1873), L. R. 6 H. L. 83.

(*b*) *See* per Lord CAMPBELL, C.J., in *Knight* v. *Faith* (1850), 15 Q. B., p. 652.

incapable of steaming and proceeding for more than forty-eight hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage." About June 27, 1881, the vessel struck something which must have been very soft, for the vessel did not lose headway. On arrival at Liverpool the vessel was examined, when it was found that the keel had been seriously damaged, and the vessel was laid up for repairs from November 28 until December 30. This damage was attributed to the accident on June 27. On November 30, the charterers gave notice that hire would cease, and the plaintiffs sought to recover in respect of this loss of hire from the defendant.

Held that the underwriter was not liable, as the plaintiff had been paid full freight for the period covered by the policy, and had sustained no loss of freight during that period.

CHAPTER IV.

The Designation of the Subject-Matter in the Policy.

In every policy the subject-matter of the insurance must be specified. (*a*) It must be designated with reasonable certainty, (*b*) but it is sufficient if this is done in general terms. Originally insurances used to be effected on "freight" *eo nomine*, and this description is sufficient to cover the freight payable under a bill of lading, (*c*) a charterparty, (*d*) or other contract of affreightment, (*e*) and also the benefit derivable by a shipowner from the employment of his ship to carry his own goods, (*f*) and the interest of a person who has paid freight in advance. (*g*) It does not include passage-money, (*h*) or under ordinary circumstances the remuneration payable for the carriage of live animals, (*i*) or of goods on deck. (*k*) "The rule as to the description of the freight of articles on deck is the same as in reference to the articles themselves. If the articles carried on deck

(*a*) Marine Insurance Act, sect. 23, sub-sect. 2.

(*b*) Marine Insurance Act, sect. 26, sub-sect. 1.

(*c*) Arnould, sect. 233; cf. *Mordy* v. *Jones* (1825), 4 B. & C. 394.

(*d*) *Thompson* v. *Taylor* (1795), 6 T. R. 478; *Atty* v. *Lindo* (1805), 1 B. & P. N. R. 236; *Mackenzie* v. *Shedden* (1810), 2 Camp. 430; *Davidson* v. *Willasey* (1813), 1 M. & S. 313; *Moses* v. *Pratt* (1815), 4 Camp. 297; *Etches* v. *Aldan* (1827), 1 Man. & R. 157.

(*e*) *Parke* v. *Hebson*, cited in *Truscott* v. *Christie* (1820), 2 B. & B. 320; *Warre* v. *Miller* (1825), 4 B. & Cr. 538; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45.

(*f*) *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *De Vaux* v. *l'Anson* (1839), 5 Bing. N. C. 519; *Keith* v. *Burrows* (1877), L. R. 2 A. C. 636; *The Thyatira* (1883), L. R. 8 P. D. 155.

(*g*) Arnould, sect. 233; *Hall* v. *l'Anson* (1855), 4 E. & B., p. 509; *Frayes* v. *Worms* (1865), 19 C. B. (N. S.) 159; *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 A. C. 209; *Robbins* v. *New York Insurance Co.* (1828), 1 Hall. 363 (Am.).

(*h*) *Denoon* v. *The Home & Colonial Assurance Co.* (1872), L. R. 7 C. P. 341; Marine Insurance Act, sect. 90, and rule 16.

(*i*) Phillips, Insurance, 3rd ed., sect. 479; *Wolcutt* v. *Eagle Insurance Co.* (1827), 4 Pick. 429 (Am.); Marine Insurance Act, rule 17.

(*k*) *Adams* v. *Warren Insurance Co.* (1839), 22 Pick. 163 (Am.); Marine Insurance Act, rule 17.

would not be covered under the general description 'cargo,' 'goods,' 'merchandise,' 'property,' etc., the compensation for so transporting them will not, in the same circumstances, be covered under the general description 'freight.'" (*l*) In more recent years the practice has grown up of describing the subject-matter of the insurance at greater length and in greater detail, as for instance "freight chartered or otherwise," (*m*) or "freight chartered or as if chartered, on board or not on board." (*n*)

While it is necessary to state with reasonable certainty the subject-matter of the insurance, it is not necessary to state the nature and extent of the interest of the assured in the subject-matter insured.(*o*) "Thus a mortgagee of a ship may cover his debt by a policy 'on ship,' (*p*) a shipowner may insure his responsibility for goods carried in his vessel by a policy 'on goods,' (*q*) or an underwriter 'on cotton' may reinsure by the same description,(*r*) and the policy need not be expressed in terms as a reinsurance." (*s*) In the case of *Carruthers* v. *Sheddon* (*t*) the assured had several interests in a cargo, viz. as partners in seven-sixteenths, as consignees of the whole, and as having a lien on the whole for advances, and it was held that they might protect all their interests under a policy "on coffee," and that it was unnecessary to state the number or nature or extent of the several interests which they possessed.

The same rules apply to insurances on freight. Thus in *Rising* v. *Burnett*,(*u*) one of several part owners of a ship effected an insurance on freight generally without specifying what share he had in the ship, and it was held that he could declare generally and recover for such interest as he had. In the case of *United States Shipping Company* v. *Empress Assurance Company* (*x*) the charterer of a

(*l*) Phillips, Insurance, 3rd ed., sect. 476.

(*m*) *Barber* v. *Flemyng* (1869), L. R. 5 Q. B. 59.

(*n*) *Scottish Shire Line* v. *London & Provincial Marine Insurance Co.*, [1912] 3 K. B. 51.

(*o*) Marine Insurance Act, sect. 26, sub-sect. 2.

(*p*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193.

(*q*) *Crawley* v. *Cohen* (1832), 3 B. & Ad. 478.

(*r*) *Mackenzie* v. *Whitworth* (1875), L. R. 1 Ex. D. 36.

(*s*) McArthur, Contract of Marine Insurance, 2nd ed., p. 61.

(*t*) (1815), 6 Taunt. 14.

(*u*) (1798), Marshall, Insurance, 4th ed., p. 570.

(*x*) [1907] 1 K. B. 259.

vessel, who had effected an insurance on "freight and/or chartered freight" was held entitled to recover for a loss of freight payable to him under the terms of a sub-charter. In early times the view was entertained that no one but the owner of a vessel was entitled to insure the freight, which he might earn, under the designation of "freight" without disclosing to the underwriters the nature of his interest. In the case of *Riley* v. *Delafield* (*y*) the plaintiff, who had been the owner of a vessel and had chartered her for a voyage, sold her some time before the insurance was effected or the voyage begun, under an arrangement by which he retained the right to the chartered freight. A policy was effected on "freight," but it was held that as the circumstances had not been disclosed he could not recover for a loss of the freight. "All the interest of the plaintiff was, then, founded upon this special agreement, and it could not strictly or technically be denominated freight, since it was not an interest accruing to the plaintiff, as owner of the vessel for the use of her. It was an interest founded entirely upon the agreement, and could not have been claimed or recovered under any other title. It could not be insured as freight, *eo nomine*, unless accompanied with a disclosure of the peculiar nature of the interest. It would otherwise be an imposition upon the insurer, who, when he is asked to insure freight, must presume that he is dealing with the owner of the vessel. The owner has a stronger interest in the equipment and management of the vessel than a stranger having no such stake in the voyage. And to allow such an interest to be covered under the name of freight, without explanation, would lead to abuse and fraud, by affording an opportunity to cumulative insurances upon the same interest and interested combinations to destroy it." (*z*)

This view was adversely criticised by Mr. Phillips,(*a*) who pointed out that a part-owner of a vessel who had chartered the remainder, with a covenant to pay the value in case of loss, could insure generally "on vessel" without specifying his interest; (*b*) and that charterers having no ownership, who had agreed to insure the vessel, need not state the particular nature of their interest. (*c*) The point was again

(*y*) (1811), 7 Johns. 522 (Am.).

(*z*) See also *Mellen* v. *National Insurance Co.* (1829), 1 Hall. 452 (Am.).

(*a*) Insurance, 3rd ed., sect. 480.

(*b*) *Oliver* v. *Greene* (1807), 3 Mass. 133 (Am.); Arnould, 2nd ed., p. 272.

(*c*) *Bartlet* v. *Walter* (1816), 13 Mass. 267 (Am.).

raised and fully considered in the case of *Huth* v. *The New York Mutual Insurance Co.*, (*d*) and the doctrine as laid down in *Riley* v. *Delafield* was approved. The cases in which this view was accepted were in the State of New York. On the other hand, in the State of Massachusetts the view put forward by Mr. Phillips was adopted, and in the case of *Clark* v. *The Ocean Insurance Co.* (*e*) it was held that a charterer might insure the amount of the freight which was for his account and risk under the denomination of freight without disclosing the nature of his interest. Again in the State of Louisiana, in the case of *Paradise* v. *Sun Mutual Insurance Co.* (*f*) the Court inclined to the opinion that a person to whom freight had been assigned by way of security could without disclosure insure his interest by a policy "on fright" *eo nomine*. (*g*) In this country the point has not been definitely raised. In the case of *Denoon* v. *The Home & Colonial Assurance Co.*, (*h*) where the policy was on "freight," the plaintiff was the mortgagee of the ship to whom the freight had been assigned; and in the case of *United States Shipping Co.* v. *Empress Assurance Co.*, (*i*) where the policy was on "freight and/or chartered freight," the plaintiff was the charterer of the vessel, but in neither case was any objection taken. (*k*)

The reason for the doctrine that a person other than the owner of the vessel must disclose the nature of his interest in freight, was that the nature of the interest was such as to vary the nature of the risk. "The only reason with any practical point in it that is given for setting aside every policy in which the word 'freight' is used, when the interest is not that of the owner of the vessel, is, that when insuring freight accruing to the owner of a vessel the underwriter has, in the natural solicitude of the owner for the safety of his vessel, as well as of his freight, an additional safeguard against possible liability on the policy, and he may be induced by that circumstance to take a risk which, without it, he would have refused." (*l*)

(*d*) (1861), 8 Bosworth 538 (Am.). (*e*) (1835), 16 Pick. 289 (Am.).

(*f*) (1851), 6 Lou. Ann. 596 (Am.).

(*g*) *See Simmes* v. *Marine Insurance Co. of Alexandria* (1825), 2 Cranch. C. C. 618 (Am.).

(*h*) (1872), L. R. 7 C. P. 341; *see* also *Moss* v. *Smith* (1850), 9 C. B. 94.

(*i*) [1907] 1 K. B. 259.

(*k*) Cf. Arnould, sect. 234.

(*l*) Per WHITE, J., in *Huth* v. *New York Mutual Insurance Co.* (1861), 8 Bosw., p. 563 (Am.).

"In some cases," says BLACKBURN, J.,(*m*) "the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated." But, as has been pointed out,(*n*) "it is difficult to see how the nature of the interest of the assured in the subject-matter can vary the risk. The true question seems to be whether, having regard to usage, the subject-matter is sufficiently described. Loans on bottomry and respondentia must, it seems, be insured as such." There is, it is submitted, no usage which precludes a charterer, an assignee, or other person having an insurable interest in freight from insuring it *eo nomine*. (*o*)

The extent to which an assured, who has a limited interest in property, may insure is not necessarily limited to the amount of his own limited interest. Thus a mortgagee of a ship, who has an interest in the safety, not of any specific part of the ship, but of every portion of the ship, and who has an interest in seeing that the whole value of the ship is insured and the full amount of the security maintained, may insure the ship to the full value for his own benefit and the benefit of other persons interested. (*p*) Similarly, a warehouseman or a carrier, to whom goods have been entrusted, may insure the goods to the full value against loss, although by the terms of his contract he may be under no liability to make good the loss, (*q*) just as he may recover from a wrongdoer the full value of the goods, although he may be under no liability to the true owner. (*r*) In every case the question is, what interest did the assured intend to insure. "It is well known in marine and fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value,

(*m*) *Mackenzie* v. *Whitworth* (1875), L. R. 1 Ex. Div., p. 41.

(*n*) Chalmers & Owen, Marine Insurance Act, 2nd ed., p. 41.

(*o*) "It has been settled for a century that 'freight' must be construed in a policy in its widest sense." Per BLACKBURN, J., in *Beckett* v. *West of England Marine Insurance Co.* (1872), 25 L. T., p. 741.

(*p*) *See ante*, p. 54. Per BOVILL, C.J., in *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P., p. 608.

(*q*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Waters* v. *Monarch Insurance Co.* (1856), 5 E. & B. 870; *L. & N. W. Ry. Co.* v. *Glyn* (1859), 1 E. & E. 652; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596; *De Forest* v. *Fulton Fire Insurance Co.* (1828), 1 Hall. N. Y. 84 (Am.); *Munich Assurance Co.* v. *Dodwell* (1904), 128 Fed. R. 410, and cases there cited.

(*r*) *The Winkfield* (1902), P. 42.

subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter: and secondly he must intend to insure the whole value at the time when the insurance is effected. He cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure." (*s*)

According to this view a person with a limited interest in property may insure on behalf and for the benefit of other persons interested as well as for his own benefit, and may recover the full value of the property insured, provided that he intended the policy to cover not only his own personal interest, but the interest of all those who were interested in the property. This view has, it is submitted, been adopted by the Marine Insurance Act, which enacts that "a mortgagee consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit," (*t*) and that "where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered." (*u*) The meaning of this latter clause was discussed by KENNEDY, L.J., in the recent case of

The Reliance Marine Insurance Company v. *Duder*, [1913] 1 K. B. 265; 81 L. J. K. B. 870; 106 L. T. 936; 17 Com. Cas. 227; 28 T. L. R. 469; 12 Asp. M. C. 223. (*x*)

The plaintiffs, an insurance company, had executed three policies of marine insurance on the vessel *Kynance*. Of these three policies, the first two covered the vessel from Newcastle, N.S.W., to any port or ports on the West Coast of South America.

(*s*) Per BOWEN, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D., p. 398.

(*t*) Section 14 (2).

(*u*) Section 26 (3).

(*x*) This case must be compared with the case of *Janson* v. *Poole* (1915), 31 T. L. R. 336.

The third policy covered the vessel "at and from Valparaiso and/or any port or ports on the West Coast of South America to the United Kingdom, risk to commence from expiration of previous policy."

The plaintiffs effected a policy of reinsurance with the defendant "upon the *Kynance* at and/or from Valparaiso and any port or ports on the West Coast of South America to any port or ports in the United Kingdom."

FACTS.—While on the voyage from Newcastle, N.S.W., the *Kynance* was lost after leaving Valparaiso, and the plaintiffs became liable to pay under the first two policies. They therefore made a claim under their policy of reinsurance, which was resisted on the ground that in taking out this policy they merely intended to cover their liability under the third policy. But it was held by BRAY, J., and the Court of Appeal, that the object of the plaintiffs in effecting the reinsurance was to cover their liability as underwriters, and that although at the time when the reinsurance was effected, the plaintiffs contemplated that their liability, if any, would be under the third policy, their intention was to cover their liability whatever it might turn out to be. The contention of the defendant failed, therefore, on the facts, and in the Court of Appeal the view was also expressed that the contention failed in point of law.

"But then," says the defendant, "I rely upon section 26, sub-section 3 of the Marine Insurance Act, 1906. That enactment runs thus: 'Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.' I hope that I shall not be judged lacking in due respect either to the Legislature or to the eminent judicial authority whose language (BRETT, J.) in *Allison* v. *Bristol Marine Insurance Co.* (*y*) has been in this sub-section imported into the statute, if I venture to say that I think, as I understand SCRUTTON, J., to think, (*z*) in agreement with the learned editors of the last edition of Arnould on Marine Insurance (*a*) that this sub-section might

(*y*) (1873), 29 L. T., p. 40, and at L. R. 1 A. C., p. 216.
(*z*) *Kynance Co.* v. *Young* (1911), 16 Com. Cas. 123.
(*a*) Sect. 252 (*b*).

have been less obscurely worded. Possibly, as those learned editors suggest, a question may some day arise under it in regard to opening a valued policy in cases where designation of the subject-matter in the policy is larger than the insurable interest of the assured, as the valuation was opened by Lord ELLENBOROUGH in *Forbes* v. *Aspinall*, (*b*) and by WILLES, J., in *Denson* v. *The Home & Colonial Insurance Co.* (*c*). But, be this as it may, I do not think that this sub-section can rightly be interpreted to mean that an insurer is thereby entitled to exclude the assured from the benefit of the insurance of any of the risks which are within the terms expressed in the written policy, and which have been presumably considered by the insurer in fixing his premium, (*d*) by showing that at the time when the insurance was effected, the assured intended in his own mind to cover only some of them. On the contrary, I think that if this sub-section is read, as it ought to be, in connection with the rest of section 26, the purpose of which, as appears by the marginal note, is to deal with 'designation of subject-matter,' the object of the sub-section is to prevent an assured who, at the time of a loss within the policy, has only a limited interest in the subject-matter which is designated in the policy in general terms—such *e.g.* as 'cargo' or 'freight'—from being prejudiced by such generality of designation, provided that the designation is not inappropriate, as *e.g.* 'rice' would be if intended to cover an interest in profits which might arise collaterally from a contract relating to the rice (*see* per BLACKBURN, J., in *Anderson* v. *Morice*; (*e*) *M'Swiney* v. *Royal Exchange Assurance* (*f*)). Having regard to the words 'interest intended by the assured to be covered,' I think that those who introduced the sub-section into the Act may also have had in view the one class of case in relation to Marine Insurance in which the intention of one of the two parties to the contract, *i.e.* the assured, is properly (I say properly because

(*b*) (1811), 13 East, 323.

(*c*) (1872), L. R. 7 C. P. 341.

(*d*) There does not seem to be much force in this argument, as the assured —*ex hypothesi*—knew what he was intending to insure, and should have effected the insurance accordingly.

(*e*) (1875), L. R. 10 C. P. 609, at p. 621.

(*f*) (1849), 14 Q. B. 634.

it is required by the very terms of the contract) matter of inquiry in regard to rights under the contract. According to the common form of policy which appears in the reinsurance policy which we are considering in this case, the insurance is effected by the insurance brokers 'as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may or shall appertain in part or in all.' The persons for whose benefit the policy was intended to enure have therefore to be ascertained. It is expressly provided by section 14 of this Act that persons—such *e.g.* as mortgagee or consignee—having only themselves a limited interest may insure for and on behalf of other persons interested as well as for their own benefit, and may recover accordingly upon the policy, although of course as laid down by Bowen, L.J., in *Castellain* v. *Preston*,(*g*) the plaintiff in such a case can keep for himself only so much of the amount recovered from the insurer as will be due in respect of his own limited interest."

It is submitted that the view put forward by the learned judge as to the objects of this clause, viz. first, to protect an assured who has merely a limited interest in the subject-matter which has been insured in general terms, and secondly, to enable an assured, who has in terms insured on behalf of himself and others, to show the persons on whose behalf the insurance was effected, is not justified by the language of the clause. With regard to the first suggestion, if the policy is to cover whatever interest the assured may prove to have, the words "intended by the assured" can have no meaning. With regard to the second suggestion, the clause does not purport to be limited to policies which in terms are effected on behalf of all persons interested, and there seems to be no sound reason for implying such a limitation.

There is this further objection, that according to this second suggestion the clause would be construed as referring, not to the interest intended to be covered, but to the interests of those assured who are intended to be covered. The clause assumes that the assured (*h*) is

(*g*) (1883), 11 Q. B. D. p. 398.

(*h*) The term assured means, it is submitted, the person to be indemnified and not the person who may have effected the policy on his behalf. Cf. Marine Insurance Act, sects. 1, 23.

in a position in which he can insure different interests, and deals in apt terms with the case of an assured, who has a limited interest in every portion of the subject-matter insured, and who, by virtue of his relation to the whole subject-matter, may insure it for its full value, and may recover the full value for the benefit of himself and all others interested. (*i*)

A more difficult question arises as to effect of the sub-section in those cases where the assured intended the policy to apply to his interest in one capacity, and it happens that he is interested in some other capacity. "If a party insured in his own name has or expects to have an interest in different capacities, or expects an interest in one capacity as that of owner, and proves to have one in a different capacity, as that of trustee, consignee, etc., is he conclusively entitled and liable to be considered as an assured, in respect of any one or more interests to which the policy is, by its terms, applicable; or may he or others determine the application of the policy by proving his intention. In other words, whether the application of the policy to one or another interest, or to divers interests, in such case depends upon the intention, just as the application of a policy for whom it may concern, in favour of one or another party, depends upon the intention.

"The question we are examining has been elaborately discussed by Mr. Duer, who concludes, that 'except in cases of fraud or misrepresentation, an inquiry into the specific interest that a party effecting a policy in his own name meant to insure is never to be permitted.' That is to say, if the assured has an interest of whatever species, answering to the description of the subject in the

(*i*) *See Waters* v. *Monarch Life Assurance Co.* (1856), 25 L. J. Q. B. 102; *L. & N. W. Ry. Co.* v. *Glyn* (1859), 28 L. J. Q. B. 188; *North British Insurance Co.* v. *Moffatt* (1871), L. R. 7 C. P., p. 31.

In America the rule is that a mortgagee or other person with a limited interest may insure to the full extent in his own name and may recover the full value (*Waring* v. *Indemnity Fire Insurance Co.* (1871), 45 N. Y. 606; *Home Insurance Co.* v. *Baltimore Insurance Co.* (1876), 93 U. S. 527; *Lockhart* v. *Cooper* (1882), 42 Am. Rep. 514; *Lucas* v. *Insurance Co.* (1883), 48 Am. Rep. 383; *Munich Insurance Co.* v. *Dodwell* (1904), 128 Fed. R. 410); but in the absence of some indication in the policy, the policy is presumed to be intended to cover only the interest of the limited owner (*Lee* v. *Adsil* (1867), 37 N. Y., p. 88; *Johnston* v. *Charles Abresch Co.* (1904), 107, Am. St. Rep. 995). In the case of *Browning* v. *Provincial Insurance Co. of Canada* (1873), L. R. 5 P. C., p. 273; 28 L. T. 853; Sir Montagu Smith used language which suggests that this presumption would not be held to exist in this country.

policy, and at risk within the description of the risks, he is liable for the premium, and the underwriters are liable for the loss, whatever may have been his intention as to the species of interest to which the policy was to be applied." (*k*)

There is no satisfactory authority on the point. In an early American case (*l*) the view was expressed that the assured could not recover in respect of his interest as consignee on the ground that he had intended to insure his expected interest as owner. But on the other hand there are several decisions to the effect that a change in the nature of the interest of the assured after the policy is effected does not affect his right to recover. Thus where a member of a mutual marine insurance association sold his ship, on which he was insured by the association, but agreed with the purchaser that, in case of it being lost within a certain time, he would pay the purchaser £500, it was held that the vendor still had an insurable interest in the ship to that amount and could recover under a policy effected while he was still the owner.(*m*) Similarly, where a person interested as owner subsequently becomes a mortgagee or *vice versâ*.(*n*) In the case of *Martin* v. *Fishing Insurance Company*.(*o*) the plaintiff at the time when the policy was taken out was the owner of half a vessel, and had advanced to his co-owner the money for the purchase of his share. Subsequently a bill of sale in favour of the plaintiff was executed by his co-owner, and it was held that the plaintiff was entitled to recover the whole amount of the loss.

In none of these cases, however, was the point raised that the assured intended merely to insure his interest in the subject-matter of the insurance in one particular capacity, and in practice such a point could only very rarely be raised with success. The general intent of every person who effects an insurance to cover his personal interest is to apply the insurance to any interest that he may have or acquire. When taking out the policy he may contemplate that he will be interested in some particular capacity, but his intention is to cover his personal interest, whatever it may turn out to be.

(*k*) Phillips, Insurance, 3rd ed., sect. 393.

(*l*) *Toppan* v. *Atkinson* (1807), 2 Mass. R. 365 (Am.); *see* also *Conway* v. *Gray* (1809), 10 East. 536.

(*m*) *Reed* v. *Cole* (1764), 3 Burr. 1512.

(*n*) *Stetson* v. *Mass. Mutual Insurance Co.* (1808), 4 Mass. R. 330 (Am.).

(*o*) (1838). 20 Pick. 389 (Am.).

It is not easy to say whether the reference in section 27 of the Marine Insurance Act to the "interest intended by the assured," was intended to apply to a case where the assured had several personal interests in the subject-matter, but on the whole it is submitted that it does not. That is to say, where the policy designates the subject-matter in general terms, it should be construed as covering all the personal interests of the assured which he has at risk, unless it was intended by the assured to cover, in addition to his personal interests, also his general interest in the property.(*p*)

Where the policy is in general terms, it must not be construed, in the absence of intention or indication to the contrary,(*q*) as covering the interest of the assured in a portion only of the subject-matter which is within its terms and which he has at risk.

Robertson v. *Marjoribanks* (1819), 2 Starkie, 573 ; 20 R. R. 740.

was an action on a policy of insurance on freight valued at £10,000 of the ship *Lady Castlereagh*, on a voyage from New South Wales to her port or ports of discharge and loading in India, during her stay and loading there, and from thence to her port or ports of discharge in Europe.

FACTS.—The vessel had been engaged to carry emigrants from New South Wales to Madras for the sum of £2500, and a charterparty was made at a later date for the conveyance of troops from Madras to England for the sum of £10,000. The vessel arrived at Madras and earned the £2500, and was then lost in a monsoon. The defendants were willing to pay £7500, but the plaintiff claimed £10,000, and offered to prove that his intention in effecting the policy was to cover only the freight from Madras.

Held that the intention of the assured not having been communicated to the underwriter, could not be regarded.

(*p*) *See* per BRETT, J., in *Allison* v. *Bristol Marine Insurance Co.* (1876), L. R. 1 A. C., p. 216.

(*q*) *Janson* v. *Poole* (1915), 31 T. L. R. 336.

Denoon v. *The Home & Colonial Assurance Company* (1872), L. R. 7 C. P. 341; 41 L. J. C. P. 162; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309,

was an action on a policy of insurance for £1000 on freight valued at £2000 of the ship *Sandringham*.

FACTS.—An arrangement had been made to convey coolies and rice from Calcutta to Mauritius, the passage-money for the coolies amounting to £1944, and the bill of lading freight for the rice to £1412. The vessel was stranded and the rice lost, but the coolies were saved and the passage-money for them paid. The plaintiff claimed a total loss, but the defendants contended that they were entitled to credit in respect of the passage-money that had been earned, on the ground that this was covered by the description of freight. On the other hand, the plaintiff said that an insurance on freight did not cover passage-money, and further that in effecting the policy he intended merely to insure the freight of the rice.

Held that an insurance on freight did not cover the passage-money, but that, if it had covered the passage-money, evidence of the intention of the assured to cover only the freight of the rice would not have been admissible, as it had not been communicated to the defendants.

This rule, namely, that where the policy is in general terms it must not be construed, in the absence of intention or indication to the contrary, as covering the interest of the assured in a portion only of the subject-matter which is within its terms and which he has at risk, may be of considerable importance in the case of insurances on freight. A shipowner may have made a charterparty under which the vessel is to proceed from A to B, and there load a cargo to be carried to C. During the voyage from A to B he may be in the course of earning this freight, and he may also be carrying a cargo in respect of which freight will be payable. He will thus have two freights at risk, both of which would be covered by a policy on freight at and from A to B. Will both these freights be covered by

the policy; or if not, what is the principle to be applied. (*r*) This question was discussed in America in the cases of *Melcher* v. *Ocean Insurance Company*, and *Ocean Insurance Company* v. *Sun Mutual Insurance Company*.

Melcher v. *Ocean Insurance Company* (1871), 59 Maine, 217; (1872). 60 Maine, 77 (Am.),

was an action on a policy of insurance for 6500 dollars on charter at and from New York to San Francisco.

Facts.—On December 24, 1863, the vessel was chartered for a voyage from New York to San Francisco. This charter was known as the San Francisco charter. On January 30, 1864, while the ship was in New York loading under the San Francisco charter, she was chartered to the Peruvian Government under a charterparty which provided that the vessel was to sail from New York on or before June 1, 1864, to San Francisco, and there proceed with all convenient despatch to Callao, Peru, and from thence to the Chincha Islands, for a cargo of guano to be taken to Hamburg or Rotterdam. This charter was known as the Rotterdam charter. The insurance was effected about March 23, 1864. The vessel sailed for San Francisco on April 1, 1864, but was wrecked in the course of the voyage.

The plaintiff recovered under other policies in respect of the freight of the San Francisco charter, and brought an action against the defendants in respect of the loss of freight under the Rotterdam charter, and he offered to give evidence to prove that the policy had been intended to cover the Rotterdam charter. The defendants took the objection that the words "at and from New York to San Francisco" in the policy were descriptive of the charter insured, and that extrinsic evidence to show that any other was intended was not admissible, as its effect would be to vary and not to explain the policy. The case was withdrawn from the jury and reported to the full Court for their opinion.

(*r*) This point was raised in the case of *Barber* v. *Fleming* (1869), L. R. 5 Q. B., p. 69, but no indication was given in the judgments as to the principle to be applied.

It was held that the words "at and from New York to San Francisco" did not describe any portion of the property insured, but simply the voyage during which the risk was to continue, and that as there were two charters to which the policy might apply, extrinsic evidence was admissible to explain the latent ambiguity.

The trial of the case proceeded and the evidence clearly showed that the policy was intended by the assured and the insurer to cover the Rotterdam charter.(*s*) The defendants then raised the further point that as the vessel at the time of the loss was sailing under the San Francisco charter, the policy on the Rotterdam charter had not attached. The Court, however, held, on the authority of *Barber* v. *Fleming* (L. R. 5 Q. B. 59), that the policy had attached, and the plaintiff recovered.

The Ocean Insurance Company v. *Sun Mutual Insurance Company* (1875), 8 Benedict, 272; (1878) 15 Blatch. 249; (1882) 107 U.S. Rep. 485,

was an action brought by the insurance company, who had been held liable to pay in the previous cases of *Melcher* v. *Ocean Insurance Company*, against the insurance company with whom they had re-insured.

Facts.—An arrangement had been made between the Ocean Company and the defendants under which the latter agreed to reinsure the Ocean Company in respect of approved risks. On March 23, 1864, the plaintiffs sent an application to the defendants in the following words: "To the Sun Mutual Insurance Company, enter on open policy of this Company 6500 dollars on charter, 2650 dollars on primage, 1500 dollars on property on board ship *Chas. S. Pennell*, at and from New York to San Francisco, including war risk, rate 6 per cent." This application was accepted by the defendants and endorsed on an open policy. The Ocean Company, having been held liable for the freight of the Rotterdam charter, sought to recover from the defendants, but the latter contended that they were not liable as they had not been informed of the existence of the Rotterdam charter, and had not intended to insure that freight.

(*s*) Cf. *Janson* v. *Poole* (1915), 31 T. L. R. 336.

At the trial before BLATCHFORD, J., it was held that the defendants were not liable on the ground "that where there are two charters, one of them having the same termini as the voyage described in the policy, and the other covering that route and a further continuing route, and the policy merely insures charter, and there is no explanation between the parties at the time of effecting the insurance, as to which of the two charters is intended, the policy must be regarded as saying that the charter intended is a charter covering only the route of the voyage described in the policy."

On appeal to the Circuit Court this decision was reversed, on the grounds that the defendants knew of the existence of the Rotterdam charter, and that the policy on charter, which was a policy of reinsurance, although not so described, must be presumed as relating to the charter which had been insured by the Ocean Company.

The case was then taken to the Supreme Court of the United States. That Court reversed (*t*) the decree of the Circuit Court, on the grounds that the policy, although in substance a reinsurance, was not so in form and must be construed according to its terms; that although the defendants may have had some information as to the existence of the Rotterdam charter, there was nothing to show that the parties intended to insure the freight of that particular charter; and that *primâ facie* the policy referred to a charter terminating with the voyage insured.

The principle to be deduced from these cases is, that if an assured has effected an insurance on chartered freight for a voyage, and has at risk and within the terms of the policy two freights, viz. a freight payable in respect of that voyage and a freight payable in respect of a subsequent voyage, the policy is in the absence of intention or indication to the contrary (*u*) to be construed as an insurance of the freight payable in respect of the earlier voyage. The same principle, it is submitted, applies in the case of an insurance on freight generally. This view is supported by a series of American decisions in which it

(*t*) Three judges dissented on the ground that the policy was intended by the parties to be a policy of reinsurance, and to cover the risk which the Ocean Company had incurred by its policies.

(*u*) *See Janson* v. *Poole* (1915), 31 T. L. R. 336.

was held that where the voyage insured consists of successive stages during which the assured has at risk successive freights, the policy should in the absence of any intention or indication to the contrary, be construed as an insurance of the freight pending during each successive passage.

Davy v. *Hallett* (1805), 3 Caines, 16 (Am.),

was an action on a policy of insurance on the freight of the *Hannah*, valued at 2000 dollars at and from Philadelphia to Omoa and Golfo Dulce, and at and from thence to Philadelphia.

Facts.—The vessel arrived safely at Golfo Dulce and there earned freight to the amount of 2000 dollars. She then took in a return cargo for Philadelphia, the freight of which was equal to 2000 dollars more, but was captured on the return voyage. The underwriters contended that as the assured had received a moiety of the freight which had been at risk under the policy, he could only recover a moiety of the valuation.

Held that the insurance was not on the totality of freight for the whole voyage but upon the freight pending during the outward and homeward voyages, and that the assured was entitled to recover the full amount of the valuation.

Patapsco Insurance Company v. *Biscoe* (1835), 7 Gill. & John. 293; 28 Amer. Dec. 219 (Am.),

was an action on a policy of insurance on freight valued at 1000 dollars, of the *Fame*, at and from Baltimore to Aux Cayes, with the privilege of one other port in the island of St. Domingo, and at and from either of them back to Baltimore.

Facts.—The vessel arrived safely at Aux Cayes, and received freight to the amount of 500 dollars. She was lost with her return cargo on the voyage back to Baltimore, and the question was whether the plaintiff was entitled to recover in respect of the freight so lost the full amount of the valuation.

Held that the insurance was not intended to be an insurance of the aggregate freights of both voyages, but an insurance of the freight

of each voyage or passage described in the policy, and that the assured could recover the full amount of the valuation.

Hugg v. *Augusta Insurance & Banking Company* (1849), 7 How. 595; 1 Taney, 159 (Am.),

was an action on an open policy of insurance for 5000 dollars on the freight of the *Margaret Hugg*, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, with liberty to touch and stay at any intermediate port in case of stress of weather, or for the purpose of transacting business.

Facts.—After completing the outward voyage in respect of which freight was earned, the vessel loaded a cargo of beef at Montevideo, to be delivered at Matanzas. On the voyage back the vessel and cargo were badly damaged, and no freight was earned.

Held that the insurance should be regarded as covering freight upon separate voyages out and home, and that the assured could recover the full amount of the loss.

The Insurance Company of the Valley of Virginia v. *Mordecai* (1859), 22 How. 111 (Am.),

was an action on a policy of insurance issued at Charleston for 4000 dollars on the freight of the barque *Susan*, thence to Rio Janeiro and back to any port of discharge in the United States. The freight was valued at 4000 dollars.

Facts.—The vessel sailed from Charleston with a full cargo and arrived at Rio Janeiro, where the outward cargo was discharged and the freight for it received. A return cargo of coffee was loaded, but after starting on the voyage the vessel was compelled, owing to stress of weather, to put back, and, owing to damage she had received, was sold, the freight of the return voyage being thus lost.

Held that the insurance was on the freight of each successive voyage, and that the underwriters were not entitled to any reduction in respect of the freight earned on the outward voyage.

Thwing v. *The Washington Insurance Company* (1858), 10 Gray. 443 (Am.),

was an action on a policy of insurance for 5000 dollars on the freight of the ship *Carolus*, valued at 25,000 dollars on board or not, from Boston to San Francisco and thence for a voyage from the Chincha Islands to the United States.

FACTS.—The vessel delivered her cargo at San Francisco on the outward voyage, and made freight to the amount of 23,000 dollars. On the homeward voyage from the Chincha Islands, the vessel in a leaky condition put into Callao and was sold. The cargo was transhipped and forwarded in another vessel to the port of delivery, but the cost of transhipment was equal to the amount of the original freight.

Held that the plaintiff could recover the full amount of the valuation, as the insurance was not on the aggregate freight of all the voyages, but on the freight pending during each period. (*x*)

Where a policy has been effected on freight, and a cargo is loaded on board the vessel, it is the freight of that particular cargo to which the policy attaches.

Green v. *The Royal Exchange Assurance Company* (1815), 6 Taunt. 68 ; 1 Marsh. 447 ; 16 R. R. 571,

was an action on a policy of insurance on freight by the ship *Defiance*, at and from the ship's port or ports of lading in the Canary Islands to London.

FACTS.—The ship, which was of two hundred tons burthen, took in a full cargo and proceeded to Lanzaretto, a very short distance from the port of loading, where, in consequence of sea damage, she was obliged to unship her cargo. The condition of the vessel was such that it would have been impossible to bring her home in that condition, or to get her repaired there, so as to bring home that cargo. The vessel was, therefore, surveyed

(*x*) *See* also *Lincoln* v. *Boston Marine Insurance Co.* (1893), 159, Mass. R. 337 (Am.) ; *post*, p. 219.

and sold to a purchaser, who within five or six weeks partially repaired her, and safely brought home in her ninety-six tons of goods.

The plaintiff claimed a total loss, but the defendants contended that he was not entitled to recover, as there had been no abandonment. GIBBS, C.J., "thought abandonment was not necessary, for he could not understand what was to be abandoned. The ship was fully laden, and as soon as she was laden, it became an insurance on the freight of the particular cargo that was on board a ship, which became incapable of bringing it home."

A verdict was given for the plaintiff, which was afterwards set aside, as the Court expressed the opinion "that this case ought to be reconsidered by the jury. They saw no ground for saying that there ought to be an abandonment in this case; but if the ship had brought home another cargo from the Canaries, and earned freight thereon, that would have been a salvage on the freight of her original cargo; for that, when the first cargo was once on board, the policy attached on the freight of that specific cargo; but if the captain being driven back, and unable to proceed with the original cargo, was yet able to proceed with a less cargo, on less freight, of this the underwriter ought to have the benefit."

Similar views have been expressed in America. "Where the freight is insured on a particular voyage, by a particular vessel, and the cargo has been put on board and the vessel actually sails in the prosecution of the voyage, it is the freight of that cargo, in that vessel and on that voyage, which is the subject of insurance and to which the policy attaches." (*y*) It has been said (*z*) that this view is inconsistent with the case of *Everth* v. *Smith*,(*a*) and there are expressions in the judgment of Lord ELLENBOROUGH in that case which apparently conflict with it. "This was an insurance on freight generally, not on any specific freight. The underwriter did not insure that any particular freight should be brought home, but if

(*y*) Per SHAW, C.J., in *M'Gaw* v. *Ocean Insurance Co.* (1839), 23 Pick., p. 409 (Am.); *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 113 (Am.); *Thwing* v. *Washington Insurance Co.* (1859), 10 Gray, p. 455 (Am.).

(*z*) *See* Arnould, sect. 1167.

(*a*) (1814) 2 M. & S. 278.

any freight is brought home, a loss has not happened for which he undertook to indemnify the assured." If this language is literally construed, it would follow that an assured who by perils insured against has lost the benefit of a freight, say of £1 per ton, but has succeeded in obtaining a substituted cargo at a freight of 10*s*. per ton, could recover nothing under the policy in respect of his undoubted loss. This, it is submitted, is not the interpretation to be put upon the language of *Everth* v. *Smith*. In that case the plaintiff had obtained a verdict for a total loss, and the question for the Court was whether that verdict could be sustained. At the trial it was proved that the plaintiff had lost the freight which he originally contemplated he would earn (*b*) during the voyage, but he did in fact earn some freight during the voyage. The plaintiff contended that although some freight had been earned, the costs incurred between the date of the loss of the original freight and the earning of the substituted freight amounted to as much as the substituted freight, and he offered to abandon the substituted freight to the underwriters provided they would pay him the amount of the costs he had incurred. But there was no evidence to the effect that any of the costs were incurred for the purpose of obtaining the substituted freight, and the delay was not attributable to this cause but to the fact of the vessel having been frozen in. Under these circumstances the Court held that there must be a new trial, for the purpose, it is presumed, of ascertaining whether in fact there had been any partial loss. "Whether the freight earned be the particular freight contracted for by the assured or a posterior freight makes no difference. If freight has been *fully* earned there can be no loss properly demandable of the underwriters."

Everth v. *Smith* (1814), 2 M. & S. 278; 15 R. R. 246,

was an action on a policy of insurance on freight valued at £1200 at and from Riga to any ports in the United Kingdom.

Facts.—The vessel had sailed from London under a charterparty which provided that the vessel after having discharged her cargo

(*b*) The loss was declared to be by detention of the Government at Riga, an embargo having been put on the vessel, but as an embargo does not put an end to a contract of affreightment but only suspends it, there does not seem to have been any loss by a peril insured against.

should load a cargo of hemp to be carried to London. The vessel after having delivered the outward cargo arrived at Riga on September 3, 1812, but owing to an order of the Russian Government was not allowed to load. The restraint continued until the middle of October, and a few days later the frost set in, in consequence of which the ship was detained there the winter, and never got a loading from the charterers, but the next spring the master procured a freight from other persons, with which he returned to this country, the expenses which had been then incurred amounting to as much or more than the freight.

The plaintiffs claimed a total loss of freight, but were willing to abandon to the underwriters the freight actually earned on being allowed the expenses incurred during the winter. They contended that the policy had attached to the freight under the charterparty, and that this freight had been lost by the embargo, which was one of the perils insured against. On the other hand, the defendants contended that the policy was merely on freight for the voyage and not on any particular freight, and that as freight on the voyage had been earned, the plaintiffs could not recover. In any case, they said, the embargo did not release the charterer from his obligation to load a cargo, and therefore the loss of the charterparty freight was not caused by any of the perils insured against. A verdict was found for the plaintiffs, but, a rule *nisi* having been obtained for a new trial,

Held that there ought to be a new trial, and the rule was made absolute.

It is also said that the view that the policy attaches to the freight of a particular cargo is inconsistent with the case of *Barclay* v. *Stirling*, but, apart from the fact that the policy in that case was so framed as to cover successive freights, when that case is examined, it will be found not inconsistent, because the substituted freight was regarded as a salvage freight to this extent, that the assured was entitled to any expenses incurred while the vessel was waiting to obtain the freight or for the purpose of loading it when obtained.

Barclay v. *Stirling* (1816), 5 M. & S. 6; 17 R. R. 245,

was an action brought by an underwriter against the defendant for money had and received to his use.

FACTS.—The plaintiff had subscribed a policy of insurance on freight of the ship *Neptune* "at and from port or ports of loading in Jamaica to her port of discharge in the United Kingdom, with leave to call at any of the West India Islands and discharge, exchange, and take on board goods."

The vessel sailed with a cargo on freight from various shippers, but got on shore off the island of Cuba, and the greater portion of the cargo, consisting of sugar, was washed away and lost. The vessel was taken to Havana, and after being repaired, took on board so much of the original cargo as had been saved, and a considerable quantity of fresh goods on freight. After news of the disaster had been received, the plaintiff paid the defendant for a total loss of freight, and he brought this action to recover the amount of freight actually received by the defendant. The defendant paid into Court money in respect of the freight of the original cargo only.

Held that the policy covered freight of goods loaded at an intermediate port, and that the plaintiff was therefore entitled to recover in respect of the goods laden at Havana, but only after deducting the charges incurred while the ship was waiting at Cuba to obtain freight, or for the purpose of loading it when obtained. (*c*)

The position seems to be that after the policy has attached to the freight payable in respect of a particular cargo or under a particular contract of affreightment, a loss of such freight by perils insured against will *primâ facie* constitute a total loss under the policy. "An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship

(*c*) The case of *Brocklebank* v. *Sughrue* (1831), 1 Moo. & R. 102, is also regarded as an authority to the same effect, but it is difficult to ascertain from the report what was the ground of the decision. It was admitted that full freight was earned. It is not clear that the original freight was lost by any of the perils insured against, and there is no suggestion that any special expenses were incurred in connection with the freight.

capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured." (*d*) If the assured treats the loss as a constructive total loss, the underwriter on freight will be entitled to the benefit of any freight which is earned or which might have been earned in the course of the voyage insured. If the loss is not an actual total loss, and the assured does not treat the loss as a constructive total loss, he will only be entitled to recover the difference between the original freight and the freight which has been or which might have been earned in the course of the voyage insured. (*e*)

If after the policy has attached to the freight payable in respect of a particular cargo, that cargo is voluntarily unladen and a different cargo substituted for it, or if after the policy has attached to the freight payable under a particular charterparty, that charterparty is voluntarily cancelled and other freight obtained in place of it, the policy will, it would seem, attach to this substituted freight. (*f*) This result certainly follows if the terms of the policy are such as to show that it was not intended to apply merely to the original freight. For instance, the policy may contain a clause giving leave to discharge and take in cargo, or the voyage insured may be a trading voyage, or may consist of a series of stages. "If it is permitted by an express clause in the policy, that the ship may touch at a certain port or ports mentioned, and the master there discharges and sells goods, and takes on board others to replace them, or which are the produce of those which he hath delivered; these goods are to be considered as in the place of the former, and the insurers run the risk of them, as of the former, together with those which remain on board." (*g*)

(*d*) Per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 99, *post*, p. 160.

(*e*) *See* further, pp. 161, 162.

(*f*) *See Everth* v. *Smith*, *ante*, p. 93; *Hughes* v. *Union Insurance Co.* (1823), 8 Wheaton, 294 (Am.).

(*g*) Weskett, Insurance, Art. "Touching." *See* also Emerigon, ch. 13, sect. 8; per Lord ELLENBOROUGH in *Hill* v. *Patton* (1807), 8 East, p. 377; per DENMAN, C.J., in *Rickman* v. *Carstairs* (1833), 5 B. & Ad., p. 664; Parsons, Marine Insurance, vol. 1, p. 523; Phillips, 3rd ed., sect. 443. For cases on policies on goods, see *Grant* v. *Delacour* (1809), 1 Taunt. 463; *Columbian Insurance Co.* v. *Catlett* (1827), 12 Wheaton, 383 (Am.); *Hunter* v. *Leathley* (1831), 7 Bing. 517; *American Insurance Co.* v. *Griswold* (1835), 14 Wend. 399 (Am.); *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Tobin* v. *Harford* (1863), 34 L. J. C. P. 37; *Merchants Marine Insurance Co.* v. *Rumsey* (1883), 9 S. C. R. 577 (Can.).

The case of *Barclay* v. *Stirling* (*h*) is to the same effect. "The question is, whether the plaintiff is entitled to the whole, or any part of the Havannah freight. The first objection is, that this policy would only have attached on the freight of such goods as were put on board at Jamaica, but not elsewhere. But such a construction is contrary to the true intent of the policy: for the policy contains no word limiting it to the goods to be put on board at Jamaica. The two termini were Jamaica and the ship's port of discharge in the United Kingdom, with leave to call at any of the West India islands; and I think, that any freight earned between these two termini, and within the limits of the leave specified, would have been covered by the policy. In a subsequent part of the policy, there is leave given to discharge, exchange, and take on board goods at any place the ship may call at; this was not to be deemed a deviation. Then, if the assured were to have full power to do this, how comes it that the freight of the goods thus taken on board is not to be included in the policy?" (*i*)

The foregoing remarks have had reference to policies in which the subject-matter was described as freight or as chartered freight, but, as was mentioned at the beginning of the chapter, the subject-matter is frequently described at greater length. An expression frequently used is "freight on board or not on board." This expression has been discussed on several occasions.

In *Robinson* v. *Manufacturers Insurance Company* (*k*) insurance had been effected on freight "on board" ship *Herald*, at and from Cadiz to a port in Sicily, and at and from thence to the port of destination in the United States. A charterparty had previously been made for a voyage from Palermo to New York at a freight of 2500 dollars, and while on the voyage from Cadiz to Palermo the vessel was wrecked and the freight lost. It was held that the plaintiff could recover for the loss of the charterparty freight. "The question is, what was intended by the words 'on board.' The sentence is obviously elliptical. Considering 'freight' as the hire or price to be paid for the use of the vessel, 'freight on board' is unmeaning. Something must be supplied. The defendants insist, that we must understand it, freight of property, when laden on board. But this is certainly not the necessary or most probable meaning. It may

(*h*) *See ante*, p. 95. (*i*) (1816), 5 M. & S., p. 12.
(*k*) (1840), 1 Metcalf, 143 (Am.).

as well mean, freight of property 'expected or intended to be put on board,' or 'agreed to be put on board,' as in the case of a charterer. . . . It may be said that the words 'on board' have, upon this supposition no effect, and mean the same as freight of the ship *Herald*. We think the meaning is nearly or wholly the same." (*l*)

The effect of these words was also discussed by Lord ESHER in the case of the *Bedouin*,(*m*) where the policy was on "freight chartered and/or as if chartered on board or not on board." "It cannot mean freight on board or not on board, because freight is never on board. Freight is the charge made by the shipowner for the carriage of goods on board his ship, and therefore these words 'on board or not on board' are a short way of saying you are asked to insure chartered freight, or, as if chartered, on goods on board or not on board. But if there were any difficulty at all in construing the words 'and/or as if chartered,' it seems to me that these words 'on board or not on board' do conclusively show it must be chartered freight; because if there is no charter, or no contract equivalent to a charter, there cannot be freight payable on goods not on board. If there is no contract making the freight payable with goods not on board, there is no freight due unless goods are on board and are carried to their destination. It follows, therefore, that these words informed him that he was asked to insure chartered freight." These words, then, according to Lord ESHER are an indication to the underwriter that the freight may be chartered freight, but not that the chartered freight will be a freight dependent on the amount of goods to be carried, because in the case of the *Bedouin* the freight was a lump sum payable monthly.

In the case of the *Scottish Shire Line* v. *The London & Provincial Marine Insurance Company*, HAMILTON, J., said: (*n*) "What is the subject-matter covered? It is freight. It is freight on frozen or

(*l*) Per SHAW, C.J., at p. 146; cf. Phillips, sect. 475. In view of the facts of the case it is not easy to follow the reasoning of this judgment. The interpretation suggested was that the words "freight on board" meant "freight of property expected or intended or agreed to be put on board," but the freight in question was a lump sum freight, and the suggested interpretation would have no application to a freight of this character. It would seem that in America the expression "freight on board" a ship was used, where in this country the form would be "freight of" or "freight upon."

(*m*) (1894). P. 1.

(*n*) (1912), 17 Com. Cas. p. 258.

refrigerated produce on board or not on board; words which no doubt are intended to meet difficulties which once arose when cargo alongside for loading, but not brought on board, was lost. It was then said that no right to freight had accrued, because no lien upon that cargo for remuneration for its carriage had accrued." (*o*)

It is submitted that the original object of the words was to get over the difficulties created by the printed clause found in many policies, "beginning the adventure upon the said goods or freight from the loading thereof on board the said ship." (*p*) Gradually these words became identified with a description of the subject-matter, and are now frequently found in policies which do not contain the printed clause they were designed to meet.

Another expression frequently used is "freight chartered or as if chartered." It has been suggested (*q*) that these words mean freight contracted for or as if contracted for, and cover, therefore, a mere expectation of freight, but this interpretation has not been adopted. In the case of *The Scottish Shire Line, Limited* v. *London & Provincial Marine Insurance Company, Limited*,(*r*) where the point was raised, HAMILTON, J., said: "It may well be that the phrase is intended to cover an expectation of freights which is an expectation only at the date of the insurance; but it is another matter altogether to say that it can apply to cover a freight which remains a pure expectation at the time of the loss. I cannot understand how 'contracted for or as if contracted for' can mean 'contracted for or not contracted for.' . . . It seems to me that the first thing to be borne in mind is that whatever 'chartered or as if chartered' may mean, they are words which qualify and describe a noun substantive which is freight. The thing covered is first and foremost

(*o*) In *De Longuemere* v. *The Phœnix Insurance Co.* (1813), 10 Johns. 127 (Am.), where a policy had been effected on "freight carried or not carried," and at the time of the loss only a portion of the cargo was loaded, but other goods which the charterer had agreed to put on board were lying ready for shipment, it was held that there could be no question but that the assured was entitled to recover as for a total loss.

(*p*) *See Jones* v. *Neptune Marine Insurance Co.* (1872), L. R. 7 Q. B. 702; *Beckett* v. *West of England Marine Insurance Co.* (1872), 25 L. T. 739; *Hopper* v. *Wear Marine Insurance Co.* (1882), 46 L. T. 107; *Hydarnes S.S. Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500; *ante*, pp. 62–65.

(*q*) *See Turnbull, Martin & Co.* v. *Hull Underwriters' Association*, [1900] 2 Q. B. 402.

(*r*) (1912), 17 Com. Cas., pp. 259, 261.

freight as known to the law—not all freight, but only freight which can be said to be 'chartered or as if chartered.'"

In the same case HAMILTON, J., discussed the meaning of these words and the interpretations which had been put upon them. The matter then came up in *Williams* v. *Canton Insurance Office*,(s) in the House of Lords. In that case there was a policy upon freight 'chartered or as if chartered'; but the question in that case turned upon the contrast between a lump sum charter freight and a bill of lading freight. Three of the opinions which were delivered, however, deal with the question. Earl of HALSBURY, L.C., said: 'These words, "or as if chartered," have to my mind no meaning where there is, as in this case, a chartered freight, and if they have any meaning at all in other cases, of which I have some doubt, I decline to speculate what their meaning would be in a case different from the present.' In the present case, *ut res magis valeat quam pereat*, I have to fit some kind of meaning on to those words.' Lord BRAMPTON said: 'I am very much disposed to think that in using in the policy the words, "freight chartered or as if chartered," it was intended by the framers of and the parties to it that whatever the facts might be, whether the ship was wholly loaded by the charterers or wholly or partly under bills of lading by other shippers, the whole was to be treated for the purposes of the policy as one entire undivided cargo, loaded by the charterers, to be carried for that one lump freight.' Lord LINDLEY said: 'The alternative, "or as if chartered," applies to freight, or what in business is treated as freight, although not made payable by the express terms of any charterparty—*e.g.* if the shipowner carries other people's goods without a charterparty, or perhaps if he carries his own goods. The phrase, "as if chartered," would also cover freight payable under a charterparty entered into after the date of the policy, if the policy without these words would not extend to such freight.'"

HAMILTON, J., while deciding that the words would not cover a mere expectation of freight, adopted the view put forward by Lord LINDLEY. "As Lord LINDLEY said, the words cover the case of a charterparty expected at the date of the policy, but only concluded after it. They cover, or may cover, the benefit that the shipowner derives from carrying his own goods, although it has been held that

(s) [1901] A. C. 462.

that is covered by the description of freight simpliciter, and they cover the case of other people's goods being carried without a charter-party—that is to say, either under a bill of lading, or, if there is no actual bill of lading, under that promise to pay which is implied from the fact that the goods are shipped and carried." (*t*)

It has been seen (*u*) that in the case of chartered freight different rules with regard to the inception of the risk apply from those which apply in the case of freight other than chartered freight. It is submitted that the object of the words "or as if chartered" is to provide that the rules applicable to chartered freight shall be applied also to other freight. The insurance is on freight generally, either chartered freight or freight which is to be treated as if it were chartered freight. These words are most frequently found in time policies and insurances of homeward freight during the outward voyage. In such cases the assured would desire the protection to be as comprehensive as possible, and to cover freight engagements of every description. It would, therefore, be more in accordance with the probable intentions of the parties to construe these words as an extension of the term freight and not as a qualification. Their conjunction, too, with the words "on board or not on board" is some indication that they were framed to meet the difficulties existing with regard to the inception of the risk in an ordinary policy on freight.

It has been suggested (*x*) that the expression "chartered freight" may only apply to freight payable under a contract of affreightment, which is in existence at the time when the policy is effected. There seems, however, no sound reason why such a narrow construction should be adopted, or why a person who is about to conclude a charter-party should not be allowed to take out an insurance in these terms. These words would, however, be an indication to the underwriter that a charterparty may be in existence. If in fact a charterparty has been effected, it is not necessary for the assured to disclose this

(*t*) (1912), 17 Com. Cas., p. 260.

(*u*) *Ante*, p. 65.

(*x*) Lord LINDLEY in *Williams* v. *Canton Insurance Office*, [1901] A. C., p. 475. In *Asfar* v. *Blundell*, [1896] 1 Q. B., p. 129, Lord ESHER, M.R., said: "In this case the plaintiffs disclosed that there was a charterparty in existence, for one of the parts of the subject-matter of insurance was chartered freight."

fact. This has been decided in an American case, (*y*) and the fact that such a point has never been taken in any of the English cases shows that this view has not been questioned.

While it is not necessary for the assured to disclose the fact that a charterparty has been effected, he must not conceal the fact that the charterparty is in an unusual form. It is no answer to say that the policy might attach in respect of such a charterparty, if it were made after the policy was effected. The risk that the policy may attach to the freight payable under such a charterparty is quite different from the certainty that it will. "I agree that concealment is something more than non-disclosure; it is the keeping something back which it is the duty of the assured to bring specifically to the notice of the underwriters. . . . It is agreed that, if a charterparty contains an unusual clause which it is very material to the underwriters to know, it is not enough for the assured merely to tell the underwriters that there is a charterparty in existence; the assured is bound to go further, and to state that it contains an unusual clause; if he does not do so there is concealment which vitiates the policy." (*z*)

The Mercantile Steamship Company v. *Tyser* (1881), 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. C. 6 n.,

was an action on a policy of insurance on chartered freight.

Facts.—A charterparty had previously been effected which contained the following provision: "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling the charterparty." The evidence showed that such a provision was of comparatively recent introduction. The vessel did not arrive by the 1st of September and the charterparty was cancelled.

Held that the concealment of the fact that the charterparty contained a cancelling clause avoided the policy. (*a*)

(*y*) *Hodgson* v. *Mississippi Insurance Co.* (1831), 2 Lou. Rep. 341 (Am.).

(*z*) Per Kay, L.J., in *Asfar* v. *Blundell*, [1896] 1 Q. B., p. 133.

(*a*) It is so usual now for charterparties to contain a cancelling clause, that there seems to be no necessity to disclose the fact, *see Ruger* v. *Firemen's Fund Insurance Co.* (1898), 90 Fed. 310 (Am.).

The Bedouin, [1894] P. 1 ; 63 L. J. ADM. 30 ; 69 L. T. 782 ; 42 W. R. 292 ; 7 Asp. M. C. 391 ; 6 R. 693,

was an action on a policy of insurance for £1500 on "freight chartered and/or as if chartered, on board or not on board," for three months, "one-third diminishing each month."

FACTS.—A charterparty had previously been made for a voyage to South America and back, freight to be at the rate of £955 per calendar month, to be paid monthly in advance, and "in the event of loss of time by . . . breakdown of engines or machinery . . . and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

Owing to an accident to the machinery the vessel was delayed for twenty-eight days and the hire consequently ceased. The underwriters contended that they were not liable as they had not been told that the charterparty contained a "twenty-four hours' clause."

Held that the ship, which was in similar terms to the policy, indicated to the underwriters that they were being asked to insure a time charter, and that as it was usual for such charterparties to contain the twenty-four hours' clause, the plaintiffs were entitled to recover.

Asfar v. *Blundell*, [1895] 2 Q. B. 196 ; [1896] 1 Q. B. 123 ; 65 L. J. Q. B. 138 ; 73 L. T. 648 ; 44 W. R. 130 ; 1 Com. Cas. 185 ; 8 Asp. M. C. 106 ; 15 R. 481,

was an action on a policy of insurance for £2000 on "profit on charter warranted free from all average."

FACTS.—The plaintiffs had chartered a vessel for a voyage from the Persian Gulf to London for a lump sum of £3900 upon the terms that all freight earned by the ship should be for account of the charterers. The plaintiffs placed the ship on the berth at various ports in the Persian Gulf, and cargo was shipped under bills of lading at certain rates of freight amounting in all to £4690. A large portion of the cargo consisted of dates, which were so

damaged by perils of the sea as to be unmerchantable as dates, although still of considerable value. The freight on this portion of the cargo was therefore not payable, and the total bill of lading freights became reduced to a sum less than the lump sum freight.

The underwriters endeavoured to escape liability on the ground that they had not been told that the charterparty was for a lump sum.

Held that the underwriters should have known that there was a charterparty, and that it was highly probable that the freight would be a lump sum freight, and therefore that the plaintiffs were entitled to recover as for a total loss.

Scottish Shire Line, Limited v. *London & Provincial Marine & General Insurance Company*, [1912] 3 K. B. 51; 17 Com. Cas. 240; 107 L. T. 46; 81 L. J. K. B. 1066; 12 Asp. M. C. 253; 56 S. J. 551.

was an action on a policy of insurance for £2000 on "freight on frozen meat and/or apples and/or refrigerated produce, valued at £15,000, chartered or as if chartered on board or not on board" the *Ayrshire*, from "any Australian and/or Tasmanian ports to the United Kingdom." The policy also contained a clause, "warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date."

A contract had previously been made with a firm of Jones & Co., under which that firm undertook to ship 40,000 cases of apples on board the *Ayrshire*, but the contract contained a clause by which it was made a condition precedent that the *Ayrshire* should arrive on or about March 20, 1910. Owing to an accident the vessel was delayed for several months, and the apples were not loaded. The underwriters resisted a claim for the loss of this freight on the ground that the nature of the apple contract had not been disclosed to them.

Held that as there had been concealment of a material fact, the plaintiffs could not recover.

CHAPTER V.

Losses under the Policy.

Freight is the benefit derivable from the employment of a vessel, and where a vessel is being employed in carrying a cargo in respect of which freight is payable, it is the freight of that cargo, in that vessel, and on that voyage which is the subject-matter of the insurance and to which the policy attaches. (*a*) Under ordinary circumstances a loss of both the vessel and the cargo will involve a loss of the freight,(*b*) unless by the terms of the contract of affreightment the freight is payable irrespective of what may happen to the ship or the cargo, (*c*) and if in such a case the shipowner is prevented from earning the freight by any of the perils insured against, he will be entitled to recover a total loss under the policy.

If the vessel is totally lost or damaged to such an extent as not to be worth repairing, and is not repaired, there may be an actual total loss of the freight, but this result does not necessarily follow, as the shipowner may be able to earn the freight by transhipping the cargo to the place of destination, and the freight thus earned is regarded as the original freight. "If the voyage is completed in the original ship it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged, without considering whether he is bound to tranship or merely at liberty to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract." (*d*) "If the shipowner, being unable

(*a*) *Green* v. *Royal Exchange Assurance Co.* (1815), 6 Taunt. 68; *M'Gaw* v. *Ocean Insurance Co.* (1839), 23 Pick., p. 409 (Am.); *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 113 (Am.); *Thwing* v. *Washington Insurance Co.* (1859), 10 Gray, p. 445 (Am.).

(*b*) Arnould, sect. 1164; Parsons, vol. ii., p. 160; per Brett, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 99.

(*c*) *Oriental S.S. Co.* v. *Tyser*, [1893] 2 Q. B. 518.

(*d*) Per Jervis, C.J., in *Rosetto* v. *Gurney* (1851), 11 C. B., p. 188; cited by Lord Blackburn in *Svendsen* v. *Wallace* (1885), L. R. 10 A. C., p. 418.

to repair his ship, transhipps the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton* v. *Thornton*, (*e*) where the freight payable in such cases is discussed. Further, in a case of this description, a policy for the original voyage will cover such cargo when transhipped in order to complete such voyage." (*f*)

The question has frequently been raised whether the shipowner, as between himself and the freighter, is under a duty to tranship, or has merely the right to do so, if he so desires. In the case of *Cook* v. *Jennings*, (*g*) LAWRENCE, J., expressed the view that it was the duty of the master to tranship. "When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight," but the position of the shipowner is generally laid down in more cautious language. "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination." (*h*) "All authorities are in unison to this extent, that the master is at liberty to procure another ship to transport the cargo to the place of destination." (*i*) In America it has been said that according to strong authorities the shipowner is bound to tranship if there be a vessel or other means of transport to the place whither the cargo should go within reasonable reach,(*k*) but this duty

(*e*) (1838), 9 A. & E. 314.

(*f*) Per LINDLEY, J., in *Hill* v. *Wilson* (1879), L. R. 4 C. P. D., p. 333; cited by COLLINS, J., in *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 1 Q. B., p. 577.

(*g*) (1797), 7 T. R. 381.

(*h*) Per Lord ELLENBOROUGH, in *Hunter* v. *Prinsep* (1808), 10 East, p. 394.

(*i*) Per DENMAN, C.J., in *Shipton* v. *Thornton* (1838), 9 A. & E. 335; *see* also *The Gratitudine* (1801), 3 C. Rob. 240; *Rosetto* v. *Gurney* (1851), 11 C. B. p. 188; *The Bahia* (1864), Br. & Lush. 292; *De Cuadra* v. *Swann* (1864), 16 C. B. (N.S.), 772; *The Soblomsten* (1866), L. R. 1 A. & E. p. 297; *Kidston* v. *Empire Marine Insurance Co.* (1867), L. R. 2 C. P. 357; *Tronson* v. *Dent* (1853), 8 Moo. P. C., p. 455; *Currie* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C., p. 83; *Notara v. Henderson* (1870), L. R. 7 Q. B., p. 231; *Attwood* v. *Sellar* (1879), L. R. 4 Q. B. D. 359; *Hill* v. *Wilson* (1879), L. R. 4 C. P. D., p. 333; *Svendsen* v. *Wallace* (1885), L. R. 10 A. C., p. 418; *Hansen* v. *Dunn* (1906), 11 Com. Cas., p. 102.

(*k*) Parsons, Law of Shipping, vol. 1, p. 234.

is imposed upon the shipowner not as shipowner, but as agent *ex necessitate* for the owner of the cargo. (*l*)

Although the shipowner, as between himself and the freighter, may not be bound, *qua* shipowner, to tranship or forward the cargo to its destination, he has undoubtedly the right to do so. "It is not of the essence of the contract, that the cargo should, in every event, be conveyed in the ship mentioned, because the party is allowed to change the ship from necessity. The delivery of the cargo is the cause of earning freight. The ship, on board of which the goods are laden, is the vehicle of conveyance agreed on, but it is only one of the means, and not, in all cases, the indispensable means, to attain the object. It is well understood and settled that when the vessel is disabled in the course of the voyage, and the cargo remains, the captain is authorised to forward it by another vessel, and thereby to earn his freight." (*m*) This right, if there is a chance of using it so as to prevent a total loss of freight, the assured must, as between himself and the underwriter on freight, either exercise himself or by a timely abandonment enable the insurer, if he choose, to exercise it for his own benefit.

The position, however, may be such that there is no chance of an opportunity of the cargo being forwarded to its destination, and in such cases there is an actual total loss of freight, unless the freighter accepts delivery of the cargo at the intermediate port under such circumstances as to render himself liable for freight or for a *pro rata* freight. (*n*) "On a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorise an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board where none is saved with the chance of an opportunity

(*l*) *See Thwing* v. *Washington Insurance Co.* (1858), 10 Gray, 443 (Am.); *Lemont* v. *Lord* (1864), 52 Maine, 365 (Am.); Kent's Comm., vol. 3, 212.

(*m*) Per KENT, C.J., in *Bradhurst* v. *Columbia Insurance Co.* (1812), 9 Johns. R., p. 19.

(*n*) "An actual total loss of ship will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight." Per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 99; cited by MATHEW, J. in *Guthrie* v. *North China Insurance Co.* (1900), 6 Com. Cas., p. 30.

of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight in the policy on freight would be an actual total loss." (*o*) "An actual total loss of freight arises only where the circumstances are such as to render the ultimate earning of freight absolutely impossible, or practically hopeless, as where the cargo itself is lost, or there are no means of forwarding it, in case of the loss of the vessel or similar decisive circumstances." (*p*)

Trinder Anderson & Company v. *Thames & Mersey Marine Insurance Company, Limited*, [1898] 2 Q. B. 114; 78 L. T. 485; 67 L. J. Q. B. 666; 3 Com. Cas. 123; 46 W. R. 561; 8 Asp. M. C. 373,

was an action on a policy on "freight chartered or as if chartered" in the ship *Gainsborough*, from Sydney to Newcastle, N.S.W., while there, and thence to any port or ports in New Zealand, while there, and thence to San Francisco.

FACTS.—While the ship was proceeding from New Zealand to San Francisco with a cargo of coals, she stranded near Honolulu, and owing to the critical position of both the vessel and the cargo, the master, on the advice of Lloyds' agent, sold them for £400. It was found by KENNEDY, J., that the sale, although premature, must have taken place within a few days of the time at which it did. The vessel was eventually got off, and the cargo remaining on board was sold for £1000 by the purchaser.

The ship was a constructive total loss, and KENNEDY, J., found that it was not "a practicable thing to carry on the cargo either in the stranded ship, or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu,

(*o*) Per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 102.

(*p*) Per RAPALLO, J., in *Hubbell* v. *Great Western Insurance Co.* (1878), 74 N. Y., p. 252 (Am.).

and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage."

Held by the Court of Appeal that as there was no chance of an opportunity of the cargo being forwarded in a substituted ship, for no other could be obtained, the assured could recover, although no notice of abandonment had been given.

In considering the question whether the cargo can be forwarded or not, regard must be had to the circumstances existing at the time, and to the interval which would have to elapse before a substituted vessel could be obtained. "Upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to reship or tranship, so as to earn the freight," (*q*) but he is not entitled to retain the cargo for more than a reasonable time. (*r*) If, therefore, there is no chance of an opportunity of the cargo being forwarded within a reasonable time, and the shipowner in consequence loses his right to detain it, he will be entitled to treat the loss as a total loss. In an early American case (*s*) the view was expressed that a master was not bound to seek for another vessel except in the port of distress or in a port immediately contiguous, but this view has not been adopted. In the case of *Bryant* v. *Commonwealth Insurance Company*, (*t*) the vessel was stranded on the coast of Virginia. The goods might have been taken to Norfolk, which was distant forty miles by land, and there reshipped, and the Court held that if it was reasonable to require the master to procure a vessel from there, he would be bound to do so. "It may happen that a vessel might be procured at a port in another state, and not geographically contiguous to the port of distress, in convenient time and upon more reasonable terms than could be had in the port of distress. We should not, therefore, be disposed to limit the operation of the

(*q*) Per Dr. LUSHINGTON in *The Soblomsten* (1866), L. R. 1 A. & E., p. 297; *The Bahia* (1864), Br. & Lush. 292; per WILLES, J., in *Kidston* v. *Empire Insurance Co.* (1866), L. R. 1 C. P., p. 542.

(*r*) *Owen* v. *Outerbridge* (1896), 26 Sup. Can. R. 272 (Can.). If the shipowner retains them for more than a reasonable time, he will be liable for the damage thereby caused, *Hansen* v. *Dunn* (1906), 11 Com. Cas. 100.

(*s*) *Saltus* v. *Ocean Insurance Co.* (1815), 12 Johns. R. 107 (Am.); *see* also *Whitney* v. *New York Firemen's Insurance Co.* (1820), 18 Johns. R. 208 (Am.); *Treadwell* v. *Union Insurance Co.* (1826), 6 Cow. 270 (Am.).

(*t*) (1828), 6 Pick. 131 (Am.).

master to any particular port or place, in regard to procuring another vessel, but to require him to do so, if upon the whole it should seem reasonable, taking into view the nature of the voyage, and the time, expense and risk of the transportation to the port of destination."

There is also, it would seem, an actual total loss of freight, if there is no chance of the cargo being transhipped and forwarded except at a cost equal to or exceeding the original freight. "If the ship is totally lost, or rightfully abandoned before the voyage is completed, she cannot earn full freight, and the underwriter is bound to indemnify the assured for the loss which he has sustained. If no freight *pro rata itineris* has been earned, or the expense of sending on the cargo by another vessel is equal to or exceeds the whole amount of freight agreed upon by the charterparty; or if no other conveyance can be had at the port of necessity, and the owner refuses to receive the goods, there is an absolute total loss of the freight, and no abandonment is necessary, because there is nothing left to abandon." (*u*)

American Insurance Company of New York v. *Center* (1827), 7 Cowen, 564; (1829) 4 Wend. 45 (Am.),

was an action on a policy of insurance on freight of the *Pallas*, at and from New Orleans to Havre.

FACTS.—After leaving New Orleans with a cargo of cotton, and while proceeding down the Mississippi River, the vessel was damaged and had to put back to New Orleans, where she was surveyed and found to be a constructive total loss and sold.

Held that the assured could recover for a total loss of freight.

JUDGMENT: "*Cui bono*, in this case employ another vessel? Here had been no progress in earning freight. The vessel is driven back with the cargo to her port of departure; where she lies as a wreck, and is sold for the benefit of those concerned. The cargo is unladen and finally received by the shippers. It seems to us that here there was a loss of freight absolutely total.

(*u*) Per WALWORTH, C., in *American Insurance Co.* v. *Center* (1829), 4 Wend. p. 53 (Am.).

We cannot intend that the hire of a vessel for the same voyage would have been at a freight less than that stipulated for in the original charterparty. There was, in truth, nothing to abandon. It is strongly intimated in *Green* v. *Royal Exchange Assurance Company* that in a case like the present, no abandonment is necessary, as there is nothing to be transferred by the assured to the insurer." (*x*)

If the vessel is totally lost or damaged to such an extent as not to be worth repairing and is not repaired, but the cargo can be transhipped and forwarded to its destination at a reasonable expense, and within a reasonable time, there is not an actual total loss of the freight, but the shipowner may by giving due notice of abandonment entitle himself to claim as for a total loss. "There seems little

(*x*) 7 Cowen., p. 583; *see* also *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 125 (Am.); *Thwing* v. *Washington Insurance Co.* (1858), 10 Gray, p. 458 (Am.).

In *Green* v. *Royal Exchange Assurance Co.* (1815), 6 Taunt. 68; 1 Marsh. 447; the vessel, after proceeding a very short way on her voyage, was compelled owing to sea damage to return to the port of departure, where she was surveyed and sold. The evidence, which is not clearly stated in the reports, seems to have been to the effect that the vessel could not have been repaired so as to bring home the original cargo, but she was repaired by the purchaser within some five or six weeks, and brought home another cargo amounting in quantity to about half of the original cargo. The plaintiff claimed a total loss, and at the trial before GIBBS, C.J., the only point taken was that the assured could not recover for a total loss as he had not given notice of abandonment (1 Marsh., p. 452); but GIBBS, C.J., thought that abandonment was not necessary, for he could not understand what was to be abandoned, and a verdict was found for the plaintiff.

Upon a motion for a new trial, the defendants raised the further point that the assured could not recover for a total loss as he should have repaired the vessel, in which case he would have been able to earn freight on the voyage. A new trial was ordered on the latter point, but the Court again stated that they saw no ground for saying that there ought to have been an abandonment. As the vessel had been sold, this view is, it is submitted, correct. If the sale was justifiable there was an actual total loss of freight, so minute a portion of the voyage having been performed that the question of transhipment was not considered to arise (6 Taunt., p. 69). If the sale was unjustifiable and the vessel could have brought home other cargo, the underwriter on freight would not be prejudiced by the failure of the shipowner to do so, and would only be liable to the same extent as if a cargo had been brought home. The Court had not to consider whether, if the vessel had not been sold, and had been able to carry other cargo, the assured could have treated the loss as a constructive total loss by giving notice of abandonment. *See* also *Idle* v. *Royal Exchange Assurance Co.* (1819), 8 Taunt. 755; 3 Br. & B., p. 151; *Mount* v. *Harrison* (1827), 4 Bing. 388.

doubt that the assured has the right of abandoning the freight where there has been a constructive total loss of the ship. (*y*)

Currie v. *The Bombay Native Insurance Company* (1869), L. R. 3 P. C. 72; 6 Moore, P. C. (N. S.) 302; 22 L. T. 317; 39 L. J. C. P. 1; 18 W. R. 296.

was an action on a policy of insurance on disbursements of the ship *Northland*, upon a voyage from Moulmein to Madras.

FACTS.—The vessel shortly after leaving Moulmein was wrecked and became a constructive total loss, and was sold together with the cargo, which consisted of timber. The plaintiffs, who were the charterers, had made advances to the captain to be paid out of freight, and on hearing of the wreck of the vessel they gave notice of abandonment.

Held that the plaintiffs could recover.

JUDGMENT.—"The possibility of freight being earned by the *Northland* was of course at an end when she was reduced to a wreck, and the case became one of total loss. It was argued on behalf of the respondents, that the captain might have hired another vessel, and forwarded the timber to its destination, and so have earned freight out of which the disbursements might have been paid. But even supposing that the advances made upon the original freight would attach upon the freight thus acquired, the captain is not under an absolute obligation to tranship a cargo when a ship is disabled from pursuing the voyage insured, but may exercise his discretion upon the subject. And while the ship was unquestionably a wreck, and utterly incapable of conveying the goods to their destination, and so earning freight the assured gave notice of abandonment to the underwriters (which their lordships have determined to be a good notice), and at this time there is no doubt there was a total loss of the disbursements which were to be paid out of freight."

(*y*) *Benson* v. *Chapman*, per TINDAL, C.J. (1843), 6 M. & G., p. 810; *see* also Phillips, 3rd ed., sect. 1630; Arnould, sect. 1168.

The Buffalo City Bank v. *The North Western Insurance Company* (1864), 30 N. Y. 251 (Am.),

was an action on a policy of insurance on freight of the *Europa*, on a voyage from Chicago to Buffalo.

FACTS.—About six miles from Buffalo the vessel went ashore and became a complete wreck. The vessel, cargo, and freight all belonged to the same owner, and each was insured in a different company. Abandonment was made of the various interests to the different insurers and was accepted. About three-quarters of the cargo was saved by the insurers of the cargo in a damaged condition and was brought to Buffalo. The defendants insisted that the plaintiffs were not entitled to recover for a total loss, but only for a partial loss.

Held that the abandonment having been accepted, the plaintiffs were entitled to recover a total loss.

JUDGMENT.—DENIO, C.J.: "It is further urged that the loss of freight was not so great as to entitle Bruce to abandon it to the defendant. The judge has, however, found that the abandonment was accepted. . . . But I think there was a just occasion for abandonment. The vessel had become a total wreck at an intermediate point which was not a port, and vessel, cargo, and the right to freight were *primâ facie* lost. No freight had been earned, and the vessel which was to have earned it was broken in pieces. If any could have ever been earned, it would not have been in any natural but in an exceptional way, as by the owner of the cargo accepting it where it then was, or by the abandonee of the ship getting it to port in some other way. An abandonment is said to be justifiable for anything, which in the course of the voyage constitutes at that time a total loss. If anything subsequently occurs as a recapture in the case of a vessel captured, or getting a cargo to port in another vessel, it is the good fortune of the underwriters, but does not affect the legality of the abandonment." (*z*)

(*z*) *See* also *Hubbell* v. *Great Western Insurance Co.* (1878), 74 N. Y. 246 (Am.).

The total or constructive total loss of a vessel may, therefore, be treated by the shipowner as involving a constructive total loss of the freight. He may give due notice of abandonment, and if the abandonment is accepted, or an action commenced, he may, if the loss was caused by perils insured against, recover as for a total loss.

Barque Robert S. Besnard Company, Limited v. *Murton* (1910), 101 L. T. 285; 14 Com. Cas. 267; 11 Asp. M. C. 299; 53 Sol. J. 717,

was an action on a policy of insurance on freight from Monte Video to New York.

FACTS.—The vessel after leaving Monte Video encountered very bad weather, and had to put into Charlestown, where a survey was held. The vessel was found to be a constructive total loss, and the cost of transhipment was likely to have exceeded the original freight. The plaintiffs thereupon gave notice of abandonment to the defendant, who refused to accept the notice, but agreed that the assured should be placed in the same position as if a writ had been issued. The vessel was subsequently purchased by the underwriters on the cargo, and after some temporary repairs had been effected, was towed into New York, where the cargo was delivered and the freight earned. The underwriter on freight contended that as the voyage was completed and the freight could have been earned, the assured could not recover.

Held that as the underwriter had agreed to place the plaintiff in the same position as if a writ had been issued, the material date was the date when the notice of abandonment was given, that as there was a loss of the freight on that date the plaintiffs were entitled to recover, and that this right was not affected by the fact that freight was subsequently earned. (*a*)

If the notice of abandonment is not accepted, and an action is not commenced, until freight has been or could have been earned by transhipping and forwarding the cargo to its destination, the position is obscure. In the case of *Rankin* v. *Potter*, BRETT, J., expressed

(*a*) *See* also *Buffalo City Bank* v. *North-Western Insurance Co.*, *ante*, p. 113.

the opinion that there was "a partial loss of freight under a general policy on freight, if in case of total loss of the ship the cargo be sent on in a substituted ship," (*b*) and in the case of *Svendsen* v. *Wallace* (*c*) Lord BLACKBURN suggested that the expenses of transhipment would be recoverable as particular average. These dicta, however, conflict with the case of *Kidston* v. *Empire Marine Insurance Company*, in which it was decided that the expenses of transhipping the cargo were not particular average but particular charges, and that the loss entailed by reason of these expenses was not to be treated as a partial loss, but as a loss under the sue and labour clause in the policy.

Kidston and Others v. *The Empire Marine Insurance Company* (1867), L. R. 2 C. P. 357; 36 L. J. C. P. 156; 16 L. T. 286; 12 Jur. (N. S.) 665; 15 W. R. 769,

was an action on a policy of insurance for £2000, on chartered freight of the ship *Sebastopol*, valued at £5000. The policy contained the usual suing and labouring clause, and a warranty against particular average.

FACTS.—While on a voyage from the Chincha Islands to the United Kingdom with a cargo of guano the vessel was damaged in a storm and had to put into Rio, where she became a wreck. The cargo was landed and warehoused and was afterwards shipped on board a vessel called the *Caprice*, chartered by the plaintiffs, and was forwarded in safety to the United Kingdom at an expense for freight of £2467 11*s*. 10*d*.

The plaintiffs brought this action with a count claiming for a total loss of freight, and another count for £1115 3*s*. 6*d*. under the suing and labouring clause for the charges and expenses of conveying the cargo from Rio. The defendants contended

(*b*) (1873), L. R. 6 H. L., p. 99. This view seems to have been adopted in America. "If the ship is rendered unnavigable, and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master has means to procure such other at an expense materially less than the amount of the freight for the voyage, the underwriter on freight or profit is not liable to be prejudiced by the master's neglect to tranship, and the loss will be adjusted as if the cargo had been transhipped and forwarded, and will be partial or total according to the amount of the loss." Phillips, sect. 1632; *Hubbell* v. *Great Western Insurance Co.* (1878), 74 N. Y., p. 254 (Am.).

(*c*) (1885), L. R. 10 A. C., p. 418.

that as the plaintiffs were able to forward the cargo by another vessel at a cost substantially less than the entire freight, a partial loss and not a total loss had been incurred, and that owing to the warranty against particular average they were not entitled to recover. No notice of abandonment was given.

Held that, when the vessel became a wreck at Rio, there would have been a total loss of freight if the cargo had not been transhipped, that the expenses of transhipment were charges within the suing and labouring clause, and did not have the effect of making the loss a partial loss.

According to this decision, if freight is in fact earned by transhipping the cargo to its destination, there is no loss of freight either total or partial, but the Court refrained from deciding whether the shipowner must tranship the cargo, if in the circumstances transhipment was the reasonable course to pursue. It intimated, however, that "it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer," and in the case of *Guthrie* v. *The North China Insurance Company*, (*d*) VAUGHAN WILLIAMS, L.J., expressed the view that, if the shipowner failed to avail himself of the right to tranship the cargo in a case in which a prudent uninsured owner would have exercised the right, he cannot say that the loss of the freight was occasioned by perils insured against. In the case of *Manchester Liners* v. *British & Foreign Marine Insurance Company*, (*e*) WALTON, J., refused to express any opinion on the point. "I desire to avoid expressing an opinion whether in such a case the loss would be a loss by perils of the seas, if the cargo could be forwarded at an expense to the shipowner less than the freight to be earned by forwarding it. But, if in such a case the loss is to be treated as a loss by sea perils, it must, I think, be on the ground that the freight insured was the freight arising from the carriage of the cargo by the ship named in the policy, that this was lost by the loss of the ship, and, therefore, by perils of the seas, and that the right remaining in the shipowner to save as much as possible of the money lost by forwarding the cargo in another vessel is in the nature

(*d*) (1902), 7 Com. Cas., p. 134. (*e*) (1901), 7 Com. Cas., p. 35.

of salvage, to the benefit of which the underwriter is entitled on payment of a total loss." It is not easy to say which is the true view. According to the Marine Insurance Act, (*f*) "it is the duty of the assured and his agents in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss," and this provision seems to indicate that the assured must endeavour to avert the loss by transhipping the cargo, if it is reasonable to do so, and if by his neglect to adopt this course, the freight, which might otherwise have been earned, is lost, the loss is to be attributed to this neglect. (*g*) The position, therefore, seems to be that, where the original vessel is lost the assured may give notice of abandonment and may recover for a total loss of freight, if the notice of abandonment is accepted or an action commenced before the freight has been earned (*h*) or could have been earned by transhipping the cargo. If the notice of abandonment is not accepted and the action is not commenced until after the freight has been earned or might have been earned,(*i*) the assured cannot recover for a loss of freight, but, if he has transhipped the cargo, he may recover under the suing and labouring clause the reasonable expenses which he has incurred.(*k*) If notice of abandonment has been given and the assured, while still persisting in the abandonment, endeavours to earn the freight by transhipping the cargo, but is unable to do so by reason of perils which are not covered by the policy, he will, it is submitted, nevertheless be entitled to recover for a total loss. The loss of the original vessel by perils insured against entitled the assured to say that there had been a loss of the freight under the policy, and that loss will continue unless it is adeemed by freight being earned. (*l*)

(*f*) Sect. 78 (4).

(*g*) Cf. *Stringer* v. *English Insurance Co.* (1869), L. R. 4 Q. B., p. 691; per BLACKBURN, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 116.

(*h*) In *Saltus* v. *Ocean Insurance Co.* (1815), 12 Johns. R. 107 (Am.), a portion of the cargo had been transhipped but had not arrived at the time of the action, and no freight had at that date been received for it, and it was held that the underwriters were not entitled to any allowance in respect of it.

(*i*) If the position is such that a prudent uninsured owner would not endeavour to earn the freight by transhipping the cargo, the assured is not bound to do so. *Saltus* v. *Ocean Insurance Co.* (1815), 12 Johns. R. 107 (Am.); *Whitney* v. *New York Insurance Co.* (1820), 18 Johns. R. 208 (Am.).

(*k*) *Kidston* v. *Empire Insurance Co.* (1867), L. R. 2 C. P. 357; *Lee* v. *Southern Insurance Co.* (1870), L. R. 5 C. P. 397.

(*l*) In *Bradhurst* v. *Columbia Insurance Co.* (1812), 9 Johns. R. 17 (Am.), where the policy was free of capture and seizure, and the transhipment was

If notice of abandonment is not given and the freight can be earned by transhipping the cargo and forwarding it to its destination, the assured must adopt this course. If the cargo is transhipped and the freight earned, there will be no loss of freight, but the assured will be entitled to recover the reasonable costs of transhipment under the suing and labouring clause.(*m*) If the goods are not transhipped, and the freight, which might have been so earned, is lost, the assured will not be entitled to recover for the loss which is to be attributed to his neglect.

Hubbell v. *Great Western Insurance Company* (1878). 74 N. Y. 246; 10 Hun. 167 (Am.),

was an action on a policy of insurance upon the freight of the ship *Tartar* on a voyage from Calcutta to New York.

FACTS.—The vessel went ashore about fifty miles from her port of destination and proved a total loss. About two-thirds of her cargo was taken out of her by a company called the Coast Wrecking Company and transhipped on steamboats and safely delivered at the port of destination, where it was sold and the proceeds received by the insurers on cargo, to whom abandonment had been made. There was no proof that the owner was unable to tranship the cargo, or that the cost of transhipment would have been excessive.

As to whether notice of abandonment had been given to the underwriters on freight the evidence was conflicting, and the judge instructed the jury that, if they found such abandonment and that it was justified by the existing facts, the plaintiff was entitled to recover as for a total loss. He further instructed them that if there was no formal abandonment, but no part of

prevented by the seizure of the goods, it was held that the assured could not recover, but in this case no notice of abandonment had been given. As to the doctrine of ademption, *see* Halsbury, Ency., vol. 17, p. 479; *Shepherd* v. *Henderson* (1881), L. R. 7 A. C., p. 49; *M'Iver* v. *Henderson* (1816), 4 M. & S. 576; *Cologan* v. *London Assurance Co.* (1816), 5 M. & S. 447; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Parry* v. *Aberdein* (1829), 9 B. & C. 411; *Lozano* v. *Janson* (1859), 2 E. & E. 160.

(*m*) *Kidston* v. *Empire Insurance Co.* (1867), L. R. 2 C. P. 357. The costs of transhipment will include those costs which are payable out of freight. *Hubbell* v. *Great Western Insurance Co.* (1878), 74 N. Y., p. 255 (Am.).

the cargo reached the plaintiff at the port of destination, they might still find for the plaintiff. The plaintiff recovered a total loss.

Held that there must be a new trial on the grounds that the loss of the original vessel did not necessarily involve a total loss of the freight, that there was nothing to show that the assured could not have earned the freight by transhipping the cargo, and that in the absence of notice of abandonment he could not treat the loss as a constructive total loss of freight.

Parmeter v. *Todhunter* (1808), 1 Camp. 541,

was an action on a policy of insurance on the freight of the ship *Portsea*, at and from Berbice to London.

Facts.—The ship was captured, recaptured, and carried into Grenada, where she was sold with the whole of the cargo. On November 9, 1807, news was received that the ship had been captured, recaptured, and carried into Grenada, but no notice of abandonment was given.

The plaintiff contended that in a case like this notice of abandonment was not necessary, *sed non allocatur*, for the goods might have been brought home in another ship, and so the freight might have been earned.

If at the time of the casualty it is doubtful whether the cargo can be transhipped and forwarded to its destination, the assured should, in order to make certain his right to treat the loss of freight as a total loss, give due notice of abandonment to the underwriters on freight. "If the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, it may be and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight." (*n*) "Where goods are

(*n*) Per Brett, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 102; M'Arthur, Insurance, 2nd ed., p. 152.

on board and the ship becomes a constructive total loss, the shipowner, in order to claim for a constructive total loss on freight, must abandon to the underwriters the right to hire another vessel and carry the cargo to its destination and so earn the freight." (*o*)

If, however, it subsequently appears that the cargo cannot reasonably be forwarded, the assured will, it is submitted, be entitled to recover for a total loss although no notice of abandonment has been given. By the loss of the original vessel there is a total loss of the freight, unless it can be averted by forwarding the cargo in another vessel. (*p*) If the cargo cannot be carried forward by any means which the assured could be expected to employ; if a prudent uninsured owner would abandon the prospect of earning the freight rather than run the risk and expense of trying to do so, and if from a commercial point of view the loss could not have been averted, the loss has never ceased to be a total loss, and for this the assured should be entitled to recover, unless it is to be said that he is to recover nothing. (*q*)

In the preceding remarks, when reference has been made to a vessel being damaged to such an extent as not to be worth repairing, it has been assumed that she has not been repaired. In such cases the rights and obligations of the shipowner with regard to the contract of affreightment and to the transhipment of the goods are the same as in the case of an actual total loss of the vessel. (*r*) But it may happen that the vessel, although damaged to such an extent as not to be worth the cost of the repairs, is repaired either by the owner or by the underwriters to whom she has been abandoned, or by the purchaser to whom she has been sold. If the vessel is repaired by the owner and completes the voyage and earns the freight, then,

(*o*) Per COCKBURN, C.J., in *Potter* v. *Rankin* (1870), L. R. 5 C. P., p. 371.

(*p*) *Kidston* v. *Empire Insurance Co.* (1867), L. R. 2 C. P., p. 367.

(*q*) Cf. *Trinder, Anderson & Co.* v. *Thames, etc., Insurance Co.*, [1898] 2 Q. B., p. 122.

(*r*) "That which in the language of maritime commerce constitutes a loss of the ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if it had sunk or broken up." Per LUSH, J., in *Rankin* v. *Potter*, cited by MELLOR, J., in the same case (1873), L. R. 6 H. L., p. 110; *see* also *Moss* v. *Smith* (1850), 9 C. B. 94; *Thwing* v. *Washington Insurance Co.* (1858), 10 Gray, 443 (Am.).

inasmuch as the freight has been earned by the assured, there is no loss of freight. (*s*)

Benson v. *Chapman* (1849), 2 H. L. C. 696; 6 M. & G. 792; 5 C. B. 330; 8 C. B. 950; 13 Jur. 969; 81 R. R. 346,

was an action on a policy of insurance upon the freight of the *Lord Cochrane*, at and from Pernambuco to Liverpool.

FACTS.—The vessel struck upon a bank on leaving the harbour of Pernambuco and had to put back. After several surveys had been held, the master decided to repair, and the cost eventually amounted to some £7000, a sum which exceeded the value of the vessel. To discharge this sum money had to be borrowed, and the master executed a bottomry bond pledging the ship, freight, and cargo. When the plaintiff heard that the expenses were likely to exceed the value of the vessel he gave notice of abandonment to the underwriters on ship and freight, and did not interfere in any way afterwards in respect of either ship or freight. The ship, after loading the cargo, sailed again from Pernambuco and arrived at Liverpool with the whole of the original cargo. Upon the arrival of the ship, proceedings to enforce payment were taken by the holders of the bottomry bond in the Court of Admiralty, and under the order of that Court the ship was sold and the proceeds of the sale and the freight were paid to the holders of the bond.

The plaintiff brought an action for a total loss, and at the trial before ERSKINE, J., a verdict was taken by consent for the plaintiff subject to the opinion of the Court upon a special case, it being agreed that the Court might draw all inferences which in their opinion ought to be drawn by a jury. The Court of Common Pleas appears to have thought that the vessel was a constructive total loss and was justifiably abandoned by the plaintiff, and that the assured was entitled to recover for a total loss of freight. This judgment was reversed in the Court of

(*s*) If the vessel is repaired for the express purpose of carrying on the cargo and earning the freight, the shipowner may be entitled to recover from the underwriter the amount of expenses so incurred. He may also be entitled to recover the costs of reshipping the cargo.

Exchequer Chamber on the ground that the adventure had not *in fact* been abandoned, and the freight had been earned and would have been received by the plaintiff but for the fact that a bottomry bond had been given for the cost of repairing the ship. The case went to the House of Lords, where the judges were summoned, and the decision of the Exchequer Chamber was unanimously affirmed, and it was

Held that the plaintiff could not recover for either a total or partial (*t*) loss of freight.

Is the result the same if the underwriter to whom the ship has been abandoned or the purchaser to whom the ship has been sold, effects repairs, completes the voyage and earns the freight? "Cases have occurred, upon ordinary policies on freight, in which, notwithstanding the total loss of the vessel, actual or constructive, the freight has yet been earned. In such cases, if it be earned whilst the vessel is under the control of the owner, the underwriter upon freight is discharged. Where the freight is earned after the owner has ceased to have the control of the vessel and she has been abandoned to the underwriter upon ship, it has been thought questionable how far the underwriter on freight is liable; and it may be open to consider whether the freight ultimately earned, though not for the owner, is to be considered as earned in the adventure assured and over which he had control, or in a new adventure after his control has ceased." (*u*) In the case of *Rankin* v. *Potter*, (*x*) Lord COLONSAY expressed the

(*t*) "As to the sum of £569, which is alleged to be the proportion of the expenses at Pernambuco which the freight ought to bear, a question might have arisen if the underwriters on freight had accepted the abandonment, and paid the total loss claimed; for then the freight having afterwards been received, if the underwriters had claimed it as money had and received to their use, and could have supported that claim, an attempt might have been made to deduct the £569 as salvage of the freight; but no such question arises in this action, in which the sum insured is claimed as lost freight, not as money paid by way of average or salvage, or in any other manner than as by loss of freight. The underwriters upon this policy engage only that freight shall be earned, and it has been earned. At all events, if by the terms of the policy any other contract can be considered to be entered into, the declaration in this case is not adapted to such contract, or to anything but loss of freight." Per ALDERSON, B., 2 H. L. C., p. 722.

(*u*) Per WILLES, J., in *Potter* v. *Rankin* (1868), L. R. 3 C. P., p. 571.

(*x*) (1873), L. R. 6 H. L., p. 161.

opinion that the effect was the same whether the freight was earned by the underwriter or by the owner of the vessel, and BRETT, J., seems to have thought that this result followed from the decision in the case of *Scottish Marine Insurance Company of Glasgow* v. *Turner*, (*y*) but he was careful to place on record the fact that this conclusion did not meet with his approval. "If from exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship; none of it could go to the assured or underwriter on freight; but freight would have been earned on the voyage insured in the policy on freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your Lordships' House that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable. If this had not been a decision in your Lordships' House, I should have ventured to think that a valid abandonment of ship was of the same effect as leaving it a wreck, and that the real total loss of freight suffered by the assured on freight was covered by the only policy which could cover it, namely, the policy on freight." (*z*) In Canada and America it has been held that the act of the underwriter to whom the vessel has been justifiably abandoned in making the repairs and earning the freight, does not prevent the assured from recovering as for a total loss of freight, and these decisions are, it is submitted, correct.

Coolidge & Gloucester Marine Insurance Company (1819), 15 Mass. R. 341 (Am.),

was an action on a policy of insurance on the ship *General Knox*, and her freight, at and from Amsterdam to Philadelphia.

FACTS.—The vessel with goods on board sailed from Amsterdam, but owing to tempestuous weather the vessel had to put into Plymouth, where she was surveyed and found to be a constructive total loss. The plaintiffs gave notice of abandonment to

(*y*) (1853), 1 Macq. 334; discussed, *post*, at p. 126.

(*z*) *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 100. *See* also *Thwing* v. *Washington Insurance Co.* (1858), 10 Gray, p. 461 (Am.).

both sets of underwriters, those on ship and those on freight. The abandonment of the ship was accepted; the abandonment of the freight was refused. The vessel was repaired and the cargo, which had been taken out of her, was reladen and the vessel earned the full freight on the voyage.

Held that the vessel after being repaired must be considered as a new vessel, that the vessel upon which the goods were originally laden was to be considered as much lost as if she was at the bottom of the sea, and that as an event had happened which prevented the old ship from carrying the goods to the port of delivery, the plaintiffs were entitled to recover. (*a*)

Troop & Another v. *The Merchants Marine Insurance Company* (1886), 13 Sup. Can. R. 506 (Can.).

was an action on a policy of insurance on freight of the *Rebecca Neily*, at and from Arecibo to Acquim and thence to New York.

FACTS.—While on the voyage the vessel encountered heavy weather, was dismasted, and towed into Guantanamo, where she was found to be a constructive total loss and was abandoned. The underwriters effected some temporary repairs, the cargo was reladen and brought to New York. The plaintiffs claimed for a total loss.

Held that there being a constructive total loss of the ship, the action of the underwriters in making the repairs and earning the freight, would not prevent the assured from recovering.

Similar decisions have been given in cases where, the original vessel being a wreck, the cargo has been transhipped by the underwriters or forwarded to its destination by some other means, but at a cost exceeding the amount of the original freight.

(*a*) "If the ship had been sold and afterwards repaired by the purchaser, and had earned freight, it would, in effect, have been a different adventure, and a different ship." Per POLLOCK, C.B., in *Chapman* v. *Benson* (1847), 5 C. B., p. 352. Cf. *Mount* v. *Harrison* (1827), 4 Bing. 388.

Thwing v. Washington Insurance Company (1858), 10 Gray, 443 (Am.),

was an action on a policy of insurance for $5000 on the ship *Carolus*, and on the freight of the said ship, on board or not on board.

FACTS.—On the homeward voyage from the Chincha Islands, the vessel put, in a leaky condition, into Callao, where she was surveyed and found to be a constructive total loss and was sold by the master. Due notice of abandonment was given to the underwriters on freight, but it was not accepted. The master forwarded the cargo at a cost equal to the original freight, and although it was not clear on whose behalf he was purporting to act, it was held that he had no authority to do this on behalf of the owner of the ship. The plaintiff claimed for a total loss, which was resisted on the ground that there was no loss of freight whatever, because the cargo had been transhipped and had arrived safely at the port of destination, where the agreed price for its carriage was paid by the consignee.

Held that the plaintiff could recover.

Robertson & Others v. *Atlantic Mutual Insurance Company* (1877), 68 N. Y. 192 (Am.),

was an action on a policy of insurance upon the freight of the brig *Ocean Wave*, at and from New York to Galveston.

FACTS.—While on the voyage the vessel stranded on the bar, near Galveston, in a storm and became a total wreck. As soon as they heard of the casualty the plaintiffs informed the defendants, and the latter, according to the finding of the Court, assumed the burden of attempting to deliver the cargo. A portion was, in fact, saved and delivered to the consignees, but at a cost exceeding the amount of the original freight. The plaintiffs claimed a total loss, which was resisted on the ground that a portion of the cargo had actually been delivered and the freight thereon collected.

Held that the plaintiffs were entitled to recover as for a total loss.(*b*)

The view that the assured cannot recover, if freight has in fact been earned although by the use of means which he could not reasonably have been expected to employ, can be traced to the decision in the case of *The Scottish Marine Insurance Company* v. *Turner*, and to the statement that "there is no instance to be found in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned." (*c*)

The Scottish Marine Insurance Company of Glasgow v. *Turner* (1853), 1 Macq. 334 (Sc.); 4 H. L. C. 312; 17 Jur. 631; 1 W. R. 527,

was an action on a policy of insurance on the freight of the ship *Laurel*.

FACTS.—While on a voyage from Quebec to Liverpool the vessel was seriously damaged by an iceberg, but succeeded in reaching Liverpool, where the cargo was delivered and the freight received. The vessel was subsequently surveyed and found to be so much damaged as not to be worth repairing, and she was therefore abandoned to the underwriters on the ship. The underwriters refused to accept the abandonment, and the owners of the vessel thereupon brought an action for a total loss, and in that action it was held that they were entitled to recover for a total loss, but were bound to account for the freight they had received. (*d*) The owners, therefore, having been compelled to surrender the freight received by them, brought this action

(*b*) The point was raised by the defendants in the case of *Guthrie* v. *North China Insurance Co.* (1900), 6 Com. Cas. 25; (1902), 7 Com. Cas. 130; where the cargo was salved by the Salvage Association acting on behalf of the various underwriters, and carried to its destination, but no decision on the point was given, as it was held that no freight was payable, the delivery of the cargo not having been made under the contract of affreightment, which had been justifiably abandoned. *See* also *Rogers* v. *Nashville Marine Insurance Co.* (1854), 9 Lou. Ann. 537 (Am.).

(*c*) *See* per ALDERSON, B., in *Benson* v. *Chapman* (1849), 2 H. L. C., p. 721; per Lord CRANWORTH, in *Scottish Marine Insurance Co.* v. *Turner*, p. 338; per Lord TRURO, *ibid.*, p. 340.

(*d*) *Stewart* v. *The Greenock Marine Insurance Co.* (1848), 1 Macq. 328 (Sc.).

against the underwriters on the freight for a total loss, contending that as the underwriters on ship had been found entitled to the freight, it must be considered as lost to the assured.

Held that the plaintiffs could not recover, as the vessel completed her voyage and the freight insured was actually earned and received by them, and but for their own subsequent act of abandoning the vessel, they might have retained it. (*c*)

In this case the freight was actually received by the assured as owners of the vessel, and their decision to abandon to the underwriters on ship was not made until a later date. It is not surprising, therefore, that the House of Lords came to the conclusion that the freight was lost to the assured, not by any of the perils insured against, but by their own subsequent election to treat the vessel as having been lost during the voyage. This decision has no application to a case where the assured justifiably abandons the voyage, and the freight is subsequently earned by reason of the transportation of the cargo being completed by the use of means which the assured could not reasonably be expected to employ, and the judgments of Lord CRANWORTH and Lord TRURO emphasised the distinction between a case of total loss and abandonment before the freight is earned, and the circumstances with which they had to deal. "My Lords, where a ship has received such injuries as entitle the owner to treat her as totally lost, and where the owner consequently abandons her to the underwriters, they come in as assignees; and so are entitled to all freight afterwards earned. It was to this state of circumstances that TINDAL, C.J., referred in *Chapman* v. *Benson*, where he said: 'The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight or the possibility of ever receiving it, if earned, such freight going to the underwriters on ship.' But here the very learned Chief Justice had in contemplation what was then treated as a total loss and abandonment *before the freight was earned.* The distinction between the case of *Benson* v. *Chapman*, according to what were

(*c*) For a similar decision, *see Fiedler* v. *New York Insurance Co.* (1857), 6 Duer. 282 (Am.).

supposed in the Court of Common Pleas to be the facts, and the present case, is, that in *Benson* v. *Chapman* before any freight had been earned there had been a damage so serious as to justify the owner in treating it as a total loss and abandoning the ship to the underwriters. Whereas in the present case the owners remained in actual possession till after the freight had been earned, and earned by reason of the ship having actually performed the voyage in question.

"I do not apprehend that there is any doubt as to the soundness of the doctrine laid down by TINDAL, C.J., though the judgment of the Court of Common Pleas was reversed by the Exchequer Chamber, and that reversal was afterwards sustained by this House. There is, however, a manifest and most important difference between the case on which TINDAL, C.J., was reasoning and the present. The Chief Justice was referring to a case of loss and abandonment before the freight had been earned. But in the case before your Lordships, although, according to the verdict, the ship was totally lost, yet there was no abandonment till after she had arrived in port, till the owners were in a position to insist on the payment of freight, and till that freight had in fact been received by them." (*f*)

Both Lord CRANWORTH and Lord TRURO referred with approval to the propositions of law laid down by TINDAL, C.J., in the case of *Benson* v. *Chapman* (although, as they pointed out, the judgment was based on an erroneous appreciation of the facts), and it becomes, therefore, necessary to consider what were the propositions laid down by the learned judge. "That there was a constructive total loss on ship, seems not to have been made a question. . . . And there seems to be as little doubt that the assured has the right of abandoning the freight, where there has been a constructive total loss of the ship. The assured has sustained a total loss of the freight, if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship. In the present case, when the ship was at Pernambuco, the cargo taken out, and the damage to the ship very far exceeding her value, and such as the owner had no means

(*f*) Per Lord CRANWORTH, p. 337; *see* also per Lord TRURO, p. 340.

of completing, except at a ruinous expense, if at that time he abandons the ship to the underwriters, as the law allows him to do, the freight is as much lost to him as if the ship had been captured and placed altogether out of his control. . . . If the master had actually sold the ship at the time the damage was sustained, and the purchaser had brought her back and earned the freight, there is no doubt but that the owner could have recovered for a total loss after abandonment." (*g*)

This decision of the Court of Common Pleas is authority for the view that, where a vessel is damaged to such an extent as not to be worth repairing, and abandonment is duly made to the underwriters, the right of the assured to recover for a total loss of freight is not defeated by the fact that freight has been earned by the vessel while out of his control. (*h*) This decision had the approval of the House of Lords in the case of *The Scottish Marine Insurance Company of Glasgow* v. *Turner*, (*i*) and the conclusion, therefore, arrived by Brett, J., (*k*) namely, that in the last-named case the House of Lords had decided that if the underwriter on ship repaired the ship and earned full freight there would be no loss of freight for which the underwriters on freight would be liable, is, it is submitted, erroneous.

This decision of the Court of Common Pleas in the case of *Benson* v. *Chapman* is also an instance in which an action for a total loss of freight has been held to be maintainable against the underwriters, although the freight had actually been earned, so that it seems inconsistent on the part of the House of Lords to approve (*l*) both the judgment of Tindal, C.J., in that case, and the statement of Alderson, B., that "there is no instance to be found in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned." (*m*) How is this apparent inconsistency to be explained? The explanation is, it is submitted, to be found in the signification of the words "where the freight had actually been earned," which mean, "where the freight

(*g*) (1843), 6 M. & G., pp. 810, 812.

(*h*) Cf. *Dixon* v. *Reid* (1822), 1 Dowl. & Ryl. 207.

(*i*) (1853), 1 Macq. 334 (Sc.), *ante*, p. 126.

(*k*) *See ante*, p. 123.

(*l*) *See* per Lord Truro in *Scottish Marine Insurance Co.* v. *Turner* (1853), 1 Macq., p. 340 (Sc.).

(*m*) *Benson* v. *Chapman* (1849), 2 H. L. C., p. 721, *ante*, p. 126.

had actually been earned by the assured." This seems to follow from the language used by Lord CRANWORTH and Lord TRURO in other parts of their opinions. "The underwriters on freight engaged that the ship should not be prevented by perils of the sea from *enabling the owners to earn her freight.* Nor was she so prevented; for in spite of those perils, she arrived in port under the conduct of the owners, and they obtained payment of her freight." (*n*) "On the ground therefore that the contract of the underwriters on freight was strictly performed, that the freight insured was *actually earned and received by the owners,* and that, but for their own subsequent act, they might have retained it against all the world, I have come to the conclusion that the judgment below is erroneous." (*o*)

There is, therefore, it is submitted, no foundation for the view that an assured cannot recover, if freight has in fact been received by a purchaser or underwriter by the use of means which the assured could not reasonably have been expected to employ.

It is further doubtful how far freight earned after a vessel has been damaged to such an extent as not to be worth repairing and has been abandoned, is the freight covered by the policy. When a vessel is, owing to excepted perils, damaged to such an extent as not to be worth repairing, the shipowner is entitled, as against the freighter to abandon the voyage. By abandoning the voyage the contract of affreightment is dissolved,(*p*) and the shipowner loses his right to possession of the cargo, which the freighter is entitled to retake. If the underwriter on ship repairs the ship, reloads the cargo, and delivers it to the consignees, he is not making the delivery under the contract of affreightment, because *ex hypothesi* the contract has been dissolved, and if he collects any freight, that freight cannot be the freight stipulated for in the contract of affreightment and covered by the policy of insurance. "It is said that where the ownership of the ship is transferred, either by sale or by abandonment to underwriters, after the voyage has commenced, and where the goods which have been shipped on board are carried to their destination by the underwriters, the underwriters or the vendee of the ship can sue the owner of the goods for freight. . . . It does not seem to me that the

(*n*) Per Lord CRANWORTH, L.C., 1 Macq., p. 336.

(*o*) *Ibid.*, p. 338; *see* also per DALLAS, C.J., in *Idle* v. *Royal Exchange Assurance Co.* (1819), 8 Taunt., p. 779.

(*p*) *See* Carver, sect. 307.

payment of freight under these circumstances is made under the original contract of affreightment. It is a payment for work and labour done, and the original contract of affreightment, where it exists, is invariably taken by the tribunal which tries the question as the measure of the value of the work and labour done." (*q*)

The position is different where the cargo is forwarded to its destination in a substituted vessel or by some other means. If the original ship is, owing to excepted perils, lost or so much damaged as not to be worth repairing, the shipowner is under no obligation to repair, but he does not necessarily lose the benefit of his contract of affreightment, as he may be able to forward the goods to the place of destination by some other means, and thus earn the agreed freight. That right on abandonment being made to the underwriters, passes not to the underwriters on ship, (*r*) but to the underwriters on the freight, (*s*) who are entitled to take, in the name of the assured, all steps which the assured himself would have been entitled to take. If therefore the underwriters decide to complete the delivery of the cargo, the delivery would be under the contract of affreightment, and the freight received would be the freight originally agreed. But in this case, as has been seen, (*t*) if the cost of transhipping or forwarding the goods is equal to or exceeds the amount of the original freight, the underwriters would not be allowed to say that there had been no loss of freight. When the ship was disabled the assured was under no obligation to take for the benefit of the underwriters steps, which a prudent owner uninsured would not have taken. (*u*) The underwriters, therefore, if the cargo is not forwarded, cannot complain that the loss which was at that time total was due to any neglect or omission on the part of the assured, (*x*) and they cannot by gratuitously intervening relieve themselves from a liability that had already accrued. (*y*)

Lastly, it is necessary to consider the case of *M'Carthy* v. *Abel*,

(*q*) Per BRETT, M.R., in *Sea Insurance Co.* v. *Hadden* (1884), 13 Q. B. D., p. 715; *see* also per Lord ELLENBOROUGH in *Case* v. *Davidson* (1816), 5 M. & S., p. 82.

(*r*) *Hickie* v. *Rodocanachi* (1859), 4 H. & N. 455.

(*s*) *Sea Insurance Co.* v. *Hadden* (1884), 13 Q. B. D. 706.

(*t*) *See ante*, p. 110.

(*u*) Per Lord TRURO in *Scottish Marine Insurance Co.* v. *Turner* (1853), 1 Macq., p. 341 (Sc.).

(*x*) *See* per Lord BLACKBURN in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 116.

(*y*) *Sailing Ship Blairmore Co., Ltd.* v. *Macredie*, [1898] A. C. 593.

which has been regarded as authority for the view that the earning of freight on the voyage insured necessarily prevents the assured from recovering as for a total loss.

M'Carthy and Others v. *Abel* (1804), 5 East, 388; 1 Smith, 524.

was an action on a policy of insurance on freight of the ship *Thomas*, at and from Riga to Plymouth.

FACTS.—The vessel was chartered to proceed to Riga and there load a cargo. After loading the cargo at Riga, the vessel was detained by the Russian Government under an embargo, and the cargo was taken out. The plaintiffs on receiving news of this, abandoned to the underwriters on ship and freight. The underwriters on the freight refused (*z*) to accept the abandonment; the underwriters on ship accepted it and paid a total loss. The vessel was subsequently released, and the cargo was again put on board and the vessel arrived at Plymouth, where the freight was collected by the underwriters on ship. The plaintiffs then brought this action against the underwriters to recover a total loss of freight.

Held that the plaintiffs could not recover.

JUDGMENT.—Lord ELLENBOROUGH, C.J.: "If the question which arises upon this case be stripped of all extraneous circumstances and considerations, it appears to us to resolve itself into this single point, viz. whether the freight has been in this case lost or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been fully and entirely earned and received by or on behalf of the plaintiffs the assured: and if so no loss can be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be considered as having, been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means

(*z*) According to the headnote in 5 East, the underwriters on freight accepted the abandonment, but this is obviously a mistake.

of an abandonment of the ship, which abandonment was the act of the assured themselves, with which therefore, and the consequence thereof, the underwriters on freight have no concern. It appears to us therefore that *quacunque via data*, that is, whether there has been no loss at all of freight, or being such, it has been a loss only occasioned by the act of the plaintiffs themselves, that they are not entitled to recover; and that therefore a nonsuit must in that case be entered."

In this case the freight was earned, and the freight earned was the original freight. The embargo did not put an end to the contract of affreightment,(*a*) and the contract was not treated by the parties to it as at an end. The vessel was not a constructive total loss,(*b*) and the agreement between the shipowner and the underwriter on ship to treat her as a constructive total loss could not make her one. The contract of affreightment was in fact performed and the freight was earned, but instead of being paid to the shipowner was by agreement paid to the underwriters on ship. In view of these facts it is not surprising that the Court held that either the freight insured had not been lost, or if it had been lost to the assured, that it had been lost by his own voluntary action. The position which arose in the case of *M'Carthy* v. *Abel* is quite different from the position which arises when a vessel is wrecked or damaged to such an extent as not to be worth repairing and the cargo cannot be transhipped. In the latter case the completion of the voyage and the earning of the freight become commercially impossible in consequence of the damage to the vessel; in the former case the voyage was only temporarily suspended and the earning of the freight, if lost to the assured, was lost in consequence of his voluntary action in agreeing to treat the vessel as a constructive total loss.

(*a*) See *Beale* v. *Thompson* (1804), 4 East, 546. Such an embargo would now probably be held to put an end to the contract. *See Embiricos* v. *Reid*, [1914] 3 K. B. 45.

(*b*) It has been said that an embargo entitles the assured to abandon, but this view, it is submitted, is not sound, unless the embargo is likely to be of long and indefinite duration (Phillips, sect. 1620). The vessel in *M'Carthy* v. *Abel* is often treated as having been a constructive total loss, but if the delay only caused a suspension of the adventure, and would not have entitled the shipowner to abandon the voyage, it could not have entitled him to abandon the vessel. *See* per DALLAS, C.J., in *Idle* v. *Royal Exchange Assurance* (1819), 8 Taunt., p. 779.

If a vessel becomes a constructive total loss, and is abandoned by the owner to the underwriters, who accept the abandonment, repair the vessel, and carry on the cargo or are able and ready to do so, this is not, it has been said,(*c*) a total loss of freight as regards a charterer, who has paid freight in advance, and effected insurance thereon. (*d*)

The foregoing remarks have applied to cases where the vessel has been lost, or damaged to such an extent as not to be worth repairing. Where the vessel can be repaired at a reasonable cost so as to carry on the cargo within a reasonable time to the port of destination and thus earn the freight, the shipowner is entitled to retain possession of the cargo for the purpose of completing the voyage, and if he fails to do so and thereby loses the freight, he cannot hold the underwriter liable, as the freight in such case would be lost by his default, and not by any of the perils insured against. (*e*) "It is now well settled by a series of cases, that if a vessel is damaged by one of the perils insured against, and in consequence thereof is obliged to put back or seek a port of refuge, and unlade and repair, the master, if he can refit his ship and proceed in a reasonable time, may retain the cargo and carry it to its place of destination, and will then earn his full freight. If, therefore, he voluntarily relinquishes the right to do so, by giving up the cargo to the shippers, he loses the right of earning the freight on that particular cargo, by such voluntary act, and not by one of the perils insured, and therefore the underwriters on freight are not answerable."(*f*)

The right of the shipowner to retain the goods while repairs are being effected is well established. "If a freighted ship becomes accidentally disabled on its voyage (without the default of the master) the master has his option of two things; either to refit it (if that can be done within a convenient time), or to hire another ship to carry the goods to the port of delivery." (*g*) "Where a ship is damaged and

(*c*) Phillips, 3rd ed., sect. 1640; Parsons, Insurance, vol. 2, p. 166.

(*d*) But *see Currie* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C., p. 83; and per BRETT, M.R., in *Sea Insurance Co.* v. *Hadden* (1884), L. R. 13 Q. B. D., p. 715.

(*e*) Arnould, sect. 1172; Phillips, sect. 1633; Parsons, Insurance, vol. 2, p. 163.

(*f*) Per SHAW, C.J., in *M'Gaw* v. *The Ocean Insurance Company* (1839), 23 Pick., p. 412 (Am.).

(*g*) Per Lord MANSFIELD in *Luke* v. *Lyde* (1759), 2 Burr., p. 887; *see* also *Cargo ex Galam* (1863), 2 Moo. P. C. (N. S.), p. 229; *Blasco* v. *Fletcher* (1863),

obliged to put into an intermediate port for repairs, it is the duty as well as the right of the shipowner, if he can repair his ship without unreasonable sacrifice, and within a reasonable time, to repair his ship and carry the goods to their destination. This is the purpose for which he has been entrusted with the cargo, and this purpose he is bound to accomplish by every reasonable and practicable method." (*h*)

This right of the shipowner to retain the cargo, while repairs are being effected, and his obligation to do so, are governed by the considerations whether the repairs can be effected so as to carry on the cargo to the port of destination within a reasonable time, and at a reasonable cost. What is meant by a reasonable time? The expression is not easy to define, but a similar meaning must be given to the word reasonable in this conjunction to that given to it in the expression "reasonable cost." If the delay is from a business point of view unreasonable, is such that in a commercial sense the commercial speculation of the parties cannot be carried out, and the adventure contemplated by the contract of affreightment becomes impossible of fulfilment, the contract of affreightment is dissolved and the shipowner loses his right to retain the cargo. (*i*) If under such circumstances he redelivers the cargo to the freighter and loses his freight, the loss cannot be attributed to his voluntary action in giving back the goods, because *ex hypothesi* he had lost the right to retain them, and if the damage to the vessel and the resulting delay were due to perils covered by the policy, he will be entitled to recover from the underwriters for the loss of freight thus caused. The existence of this principle in cases where the cargo has not yet been loaded is well established,(*k*) but it has been said that where the cargo is already on board, very different considerations arise.(*l*) But those

14 C. B. (N. S.) 147; *The Soblomsten* (1866), L. R. 1 A. & E., p. 297; *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 1 Q. B., p. 579.

(*h*) Per KENNEDY, J., in *Hansen* v. *Dunn* (1906), 11 Com. Cas., p. 102.

(*i*) *See* Scrutton, 6th ed., pp. 83—88, and cases there cited; cf. *Rodoconachi* v. *Elliott* (1874), L. R. 9 C. P. 522; Crump, Insurance, p. 124.

(*k*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125; *Jamieson* v. *The Newcastle S.S. Freight Insurance Association*, [1895] 2 Q. B. 90; *Nickoll* v. *Ashton*, [1901] 2 K. B. 126.

(*l*) Per Lord BLACKBURN in *Dahl* v. *Nelson* (1881), L. R. 6 A. C., p. 53; *see* also per COLLINS, J., in *Bensaude* v. *Thames & Mersey Insurance Co.* (1896), 75 L. T., p. 156.

considerations are considerations of fact,(*m*) and the principle of law remains the same whether the contract of affreightment is still executory or not.(*n*)

What delay will cause a frustration of the adventure? Under ordinary circumstances a delay for the purpose of repairing the vessel of six,(*o*) twelve,(*p*) or fourteen (*q*) days, or three (*r*) or six (*s*) weeks, or of two (*t*) and even four (*u*) months, will not have this effect, but no definite time can be prescribed. The circumstances of each case, the nature of the trade and voyage upon which the vessel is engaged must be considered.(*x*) Thus in a case where the voyage was a short river trip of about seven or eight days, the view was expressed that the shipowner would not be justified in detaining a cargo for a month or six weeks in order to make the necessary repairs and continue the trip.(*y*) On the other hand, where a vessel took a cargo late in the season for transportation around the Lakes, and owing to the closing of navigation could not be repaired until the following spring, it was held that the shipowner was entitled to retain the cargo, and could not recover from the underwriters for a loss of freight due to his failure to do so. (*z*)

(*m*) *See* per GRAHAM, J., in *Musgrave* v. *Mannheim Insurance Co.* (1899), 32 Nova Scotia R., p. 423: *Embiricos* v. *Reid*, [1914] 3 K. B. 45.

(*n*) *Owen* v. *Outerbridge* (1896), 26 S. C. R. 272 (Can.). *See* per KENNEDY, J., in *Hansen* v. *Dunn* (1906), 11 Com. Cas., p. 102; *Embiricos* v. *Reid* (1914), 3 K. B. 45.

(*o*) *Griswold* v. *New York Insurance Co.* (1806), 1 Johns. R. 205; (1808), 3 Johns. R. 321 (Am.).

(*p*) *Tronson* v. *Dent* (1856), 8 Moo. P. C. 419.

(*q*) *Herbert* v. *Hallett* (1802), 3 Johns. Cas. 93 (Am.).

(*r*) *Allen* v. *Mercantile Mutual Insurance Co.* (1871), 44 N. Y. 437 (Am.).

(*s*) *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, 342 (Am.); *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer. 204 (Am.); *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 1 Q. B. 571.

(*t*) *Saltus* v. *Ocean Insurance Co.* (1817), 14 Johns. R. 138 (Am.). *Clark* v. *Mass. Fire Insurance Co.* (1824), 2 Pick. 104 (Am.).

(*u*) *M'Gaw* v. *Ocean Insurance Co.* (1839), 23 Pick. 405.

(*x*) Per KENT and RADCLIFFE, JJ., in *Herbert* v. *Hallett* (1802), 3 Johns. Cas. 93 (Am.). Per PARK, J., in *M'Andrew* v. *Adams* (1834), 1 Bing. N. C., p. 41; per MANISTY, J., in *Adamson* v. *Newcastle Insurance Association* (1879), L. R. 4 Q. B. D., p. 465.

(*y*) *Roe* v. *Crescent Mutual Insurance Co.* (1856), 11 Lou. Ann. 408 (Am.); *Blanks* v. *Hibernia Insurance Co.* (1884), 36 Lou. Ann. 599 (Am.); *Field* v. *Citizens Insurance Co.*, 11 Mo. 50 (Am.); Parsons, Insurance, vol. 2, p. 163.

(*z*) *Murray* v. *Aetna Insurance Co.* (1864), 4 Biss. 417 (Am.); *see* also *Braithwaite* v. *Power*, 48 N. W. R. 354. "A shipment by water on the verge of winter

If the cargo be of a perishable nature, and so damaged as to become perishable, and would in all probability perish before the repairs could be effected or the voyage completed, the shipowner loses his right to retain it. (*a*) "If the repairs at the port of distress would take so long that the cargo cannot endure the delay, but would in all probability perish before it could arrive at the port of destination, then as the shipowner would in that event not earn freight in respect of the goods not arriving in specie, the reason for the lien would not continue to exist." (*b*) The object of the adventure from the freighter's point of view is to have his goods carried to the port of destination, and the object of the adventure from the shipowner's point of view is to earn freight by performing that service for the freighter.(*c*) If the goods are detained while the repairs to the vessel are being effected, they will never be able to arrive in specie. The freighter will lose his goods, and the shipowner will lose his freight.(*d*) Owing to the damage, therefore, and the consequent necessity for repairs, the mercantile adventure contemplated by the contract of affreightment is frustrated, and if in such a case the damage was due to any of the perils insured against, the assured will be entitled to recover from the underwriters for the resulting loss of freight.

Musgrave v. *The Mannheim Insurance Company* (1899), 32 Nova Scotia Rep. 405,

was an action on a policy of insurance on freight of the steamship *Tyrian*, at and from Halifax to Havana.

FACTS.—While on the voyage the vessel was severely damaged by perils of the sea and put into the port of Hamilton, Bermuda, for repairs. Owing to the length of time, which the repairs would take, it was feared that the cargo, which was undamaged and consisted of potatoes and dry fish, would perish, and as it

must be understood by both parties to be subject to the risks of delay from the closing of navigation, nothing to the contrary appearing in their contract." Cf. *Metcalfe* v. *Britannia Ironworks Co.* (1877), L. R. 2 Q. B. D. 423.

(*a*) Maclachlan on Shipping, 5th ed., 479.

(*b*) Per KING, J., in *Owen* v. *Outerbridge* (1896), 26 S. C. R., p. 276 (Can.).

(*c*) *See* per BRETT, J., in *Hudson* v. *Hill* (1874), 43 L. J. C. P., p. 279.

(*d*) *See Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138; *Asfar* v. *Blundell*. [1896] 1 Q. B. 123.

could not be transhipped and forwarded to Havana except at a cost considerably in excess of the original freight, the shipowner redelivered it to the freighters without demanding any freight. He thereupon claimed to recover from the defendants for a total loss of freight, and the jury found that owing to the necessary delay in repairing the vessel, the cargo would cease to exist in specie before it could arrive at Havana.

Held that the adventure having been frustrated by a peril insured against, there was a total loss of the freight. (*e*)

If the cargo can be reshipped so as to arrive in specie,(*f*) although so damaged as to be of little value, the shipowner is, according to a series of American decisions,(*g*) entitled to retain it. If, therefore, instead of so doing, he delivers it to the freighter, he cannot claim from the underwriters on freight for a loss which was caused, not by any of the perils insured against but by his own voluntary action.(*h*)

Herbert v. *Hallett* (1802), 3 Johns. Cases, 93,

was an action on a policy of insurance on freight of the brig *Eliza* from New York to Havana.

FACTS.—Shortly after leaving New York the vessel was driven on shore. The cargo was taken out and brought to New York, and two or three days later the vessel was also brought back,

(*e*) GRAHAM, J., discusses the authorities in his judgment. Cf. *The Isabella* (1801), 4 C. Rob. 77.

(*f*) The term "in specie" is to be construed in a business sense. Goods which have become unmerchantable so that they cannot be dealt with by business people as the things which they originally were, are considered to have lost their species. *See* per Lord ESHER, M.R., in *Asfar* v. *Blundell*, [1896] 1 Q. B., p. 128.

(*g*) There is no English authority to the effect that under such circumstances the shipowner has the right to retain the cargo. In *Tronson* v. *Dent* (1853), 8 Moo. P. C., pp. 449—459, it was laid down that it was the duty of the shipowner to carry the cargo to the place of destination, if it could be carried to its destination in a merchantable state, although very much damaged. *See* also *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225.

(*h*) *McGaw* v. *Ocean Insurance Co.* (1839), 23 Pick., p. 412 (Am.); *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer. 215 (Am.); *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 120 (Am.); *Allen* v. *Mercantile Mutual Insurance Co.* (1871), 44 N. Y., p. 441 (Am.).

and repaired at a small expense within two or three weeks. The cargo was damaged, but there was no clear evidence as to the extent of the damage, or what exactly was done with it. When the repairs to vessel were completed, the plaintiff proceeded on a different voyage.

Held that the plaintiff "had no right to recover, as he ought to have insisted on carrying on the goods, so as to entitle himself to the freight; and having lost the freight by his negligence or folly, the insurers were not liable."

Griswold v. *The New York Insurance Company* (1806), 1 Johns. R. 205; (1808) 3 Johns. R. 321,

was an action on a policy of insurance on the freight of the ship *Culloden*, at and from New York to Barcelona, with liberty to touch at Gibraltar.

Facts.—While endeavouring to get out of New York harbour the vessel stranded and had to put back to New York for repairs, which were effected in about six days, at a cost of one hundred and fifty dollars. The cargo, which consisted of flour, was greatly damaged and was redelivered to the freighters. It was not in a fit condition to be reshipped, and, if this course had been adopted, it would have been valueless at Barcelona, but there was no evidence to show that it would then have ceased to exist in specie. The plaintiffs gave notice of abandonment.

Held that they were not entitled to recover, as they ought to have insisted on carrying on the cargo, and run the risk of it arriving in specie at the place of destination.

Saltus v. *The Ocean Insurance Company* (1817), 14 Johns. R. 138,

was an action on a policy of insurance on the freight of the ship *Nancy*, at and from New York to Lisbon.

Facts.—During the voyage the vessel encountered a very violent storm and was so much damaged that she had to put into Newport for repairs, which took about two months. The cargo, which

consisted of rye flour and Indian corn, was not in a state to bear transportation and required great care to preserve it from further deterioration, but there was no evidence as to whether it could have been carried to Lisbon so as to arrive in specie. It was, however, unshipped and sold. During the course of the voyage a small portion of the cargo had been jettisoned.

Held that, except as to freight payable in respect of the portion jettisoned, the plaintiffs could not recover.

M'Gaw v. *The Ocean Insurance Company* (1839), 23 Pick. 405 (Am.),

was an action on a policy of insurance on the freight of the ship *Choctaw*, at and from New Orleans to Havre.

Facts.—Soon after leaving New Orleans the vessel ran aground and had to be brought back for repairs, which took some three or four months. The cargo, which consisted of tobacco and cotton, was unladen. The greater portion of the tobacco had been wetted and had actually decayed, but the rest of the cargo, although damaged, could have been forwarded to its destination in specie. The master, however, believing that his vessel could not be repaired so as to carry it forward in a reasonable time, redelivered it to the consignor.

Held that, except as to the freight of the tobacco which had decayed, the plaintiff could not recover, because he might have retained it to be transported in his own vessel, and was not bound to give it up without receiving full freight on it.

Hugg and Another v. *Augusta Insurance and Banking Company* (1849), 7 How. 595; (1851), Taney, 159 (Am.),

was an action on a policy of insurance on the freight of the bark *Margaret Hugg*, at and from Baltimore to Rio Janeiro and back to Havana.

Facts.—During the voyage the vessel ran ashore and had to put into Nassau for repairs. The cargo consisted of jerked beef. A

portion of it was jettisoned at the time of the accident, a portion was so much damaged by sea water that the authorities at Nassau refused to allow it to be landed, and the balance was landed and sold. At the first trial, the Court was divided in opinion upon the question of law, and the case was taken to the Supreme Court. That Court laid down that the plaintiffs could not recover for a total loss if the vessel could have been repaired in a reasonable time and at a reasonable expense so as to perform the voyage, or if another vessel could have been procured and the beef could have been conveyed in specie to the port of destination. At the subsequent trial—

Held that the plaintiffs could recover.

Ogden v. *The General Mutual Insurance Company* (1853), 2 Duer. 204 (Am.),

was an action upon a time policy of insurance upon freight of the *St. Patrick* against total loss only. The policy provided that the defendants should not be liable for any partial loss whatever, nor for general average.

Facts.—While on a voyage from New York to Liverpool the vessel was damaged and had to put back to New York, where she was repaired in about six weeks. The cargo, which was a general one belonging to different shippers, with the exception of a portion that had been jettisoned, and a further portion that was so seriously damaged as not to be fit to be forwarded, was transhipped and forwarded to Liverpool at an increased freight. When the vessel was repaired, she took in a further cargo for Liverpool at a higher rate of freight than that originally agreed.

Held that the master might have entitled the plaintiff to freight upon the undamaged goods by retaining them and carrying them forward in his own vessel, and that as the insurance was upon the whole freight as one integral subject, and not upon the separate items of freight, there was not a total loss under the policy.

Murray v. *Aetna Insurance Company of Hartford* (1864), 4 Biss. 417 (Am.),

was an action on a policy of insurance on freight, at and from Chicago to Kingston.

FACTS.—During the voyage which began late in the autumn the vessel was damaged and had to be towed into the port of Goderich in Canada for repairs, which could not be completed until the opening of navigation in the following spring. The greater part of the cargo was undamaged, and could, in spite of the delay, have been carried to the port of destination in specie, but it was sold. In the action to recover the freight thereby lost,

Held that the delay, in view of the nature of the voyage, would not have been unreasonable, and the loss, therefore, of the freight was not in consequence of a peril of the sea, but of the voluntary act of the master.

Allen v. *The Mercantile Mutual Insurance Company* (1871), 44 N. Y. 437 (Am.),

was an action on a policy of insurance on freight of the brig *Rio Grande*, at and from Cleveland to Ogdensburg.

FACTS.—The vessel sailed with a full cargo of flour and wheat from Cleveland on November 24, 1863, and on the following day stranded at the mouth of the Welland Canal. The cargo, which was wet and damaged, was taken out and the vessel was taken to Buffalo, where she was repaired in about three weeks, but by that time the Welland Canal was closed with ice. The canal would not have been open for navigation until the following spring, and in the meantime the damaged cargo, although existing in specie, would have become worthless, and as there were no means of forwarding it to Ogdensburg except at an expense greater than the original freight, the shipowner redelivered it to the shipper without demanding freight. In an action brought to recover the freight so lost,

Held that he could not recover, as the delay caused by the repairs and the closing of navigation did not terminate or dissolve the contract of affreightment, and the shipper was not entitled to the redelivery of his goods without payment of the full freight.

According to these decisions the question in each case is, whether the goods can arrive in specie; and the individual interest of the cargo owner or the object which he had in view when making the shipment is not an element to be considered. "The interest of the insured or of the underwriter of the cargo is not taken into the account, nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port." (*i*) "Nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and indeed, must be manifestly correct upon principle. It is as clear that after the shipment of the cargo on the voyage the shippers have no right to demand it at any intermediate port short of the port of destination, without payment of the full freight for the voyage whether the cargo arrive there in a damaged or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract *in invitum* and cut him off from all freight, or dismiss him with a *pro rata* freight. The contract of the shipowner is to carry the cargo to the port of destination, but he by no means warrants the state in which it shall arrive, as it may be affected by the perils of

(*i*) Per NELSON, J., in *Hugg* v. *Augusta Insurance Co.* (1849), 7 How., p. 608 (Am.); *Griswold* v. *New York Insurance Co.* (1808), 3 Johns. R., p. 328 (Am.); *M'Gaw* v. *Ocean Insurance Co.* (1839), 23 Pick., p. 413 (Am.); *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer., p. 220 (Am.); *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 121 (Am.).

the seas, or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo is carried on in a damaged state, it will be ruined. The true reply is, that the shipowner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him because the cargo is in danger of ruin by a calamity against which he did not warrant them." (*k*)

Clark v. *Massachusetts Fire & Marine Insurance Company* (1824), 2 Pick. 104 (Am.),

was an action on a policy of insurance on the freight of the barque *American*, at and from Richmond to Nice, and at and from thence to Malaga.

FACTS.—In the course of the voyage the vessel was damaged and had to put into the port of Kennebunk, where it was found that the repairs would take about two months. The cargo consisted of tobacco, which was intended by the shippers for the November concours, and this object would have been defeated by the delay occasioned by the repairs of the vessel. It was, therefore, redelivered to them by the plaintiff and the freight thereby lost.

Held that the plaintiff could not recover, as he might have detained the tobacco for the purpose of earning the freight, while the repairs to the vessel were being effected. (*l*)

Where the repairs to the ship cannot be effected so as to carry on the cargo to the port of destination within a reasonable time, (*m*) then, subject to the shipowner's right to tranship for the purpose of earning the freight, the contract of affreightment is dissolved, and if there is no chance of an opportunity of the cargo being forwarded except, perhaps, at a cost which would be equal to or would exceed

(*k*) Per STORY, J., in *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 353 (Am.).

(*l*) Cf. *Hudson* v. *Hill* (1874), 43 L. J. C. P. 273; *Waugh* v. *Morris* (1873), L. R. 8 Q. B., p. 207; *Cargo ex Argos* (1873), L. R. 5 P. C., p. 162.

(*m*) *See ante*, p. 135.

the amount of the original freight, and no chance of obtaining a substituted cargo on the insured voyage, there is an actual total loss of freight, and the assured need not give notice of abandonment. (*n*) At the time of the accident, however, it may be difficult to decide whether the repairs can be effected so as to carry on the cargo within a reasonable time, and the freight thereby earned. As between the shipowner and the freighter a reasonable time is allowed in which to decide this question, (*o*) but if there is no reasonable prospect of the cargo being so carried on, the parties are not bound to wait for an indefinite period to see if any change occurs. (*p*) On the other hand, if there is a prospect of the cargo being carried and the freight being earned, the shipowner has the right and the duty to prosecute the voyage. As between the shipowner and the underwriter on freight, if the contract of affreightment is dissolved, there is a total loss of that freight. If the contract of affreightment is not dissolved, because, according to existing circumstances, there is a prospect of the adventure being completed, the shipowner cannot by giving notice of abandonment convert into a constructive total loss that which at the time is not a total loss or likely to become one.(*q*) But in such a case, if the expectation ultimately proves to be erroneous, and the freight cannot be earned, then provided that the loss was due to any of the perils insured against, the assured would be entitled to recover under the policy for a partial loss, if the loss be partial, or for a total loss if the loss be total. (*r*)

If in fact the delay is not so great as to break up the voyage but merely suspends it, the shipowner cannot recover under an ordinary policy on freight for the increased cost of wages and provisions caused by the delay or for the loss of profit due to the prolongation of the voyage. "With the cost to the assured of earning freight, the underwriters have nothing to do, and the amount of such cost does not

(*n*) *See Green* v. *Royal Exchange Assurance* (1815), 6 Taunt. 68; *Idle* v. *Royal Exchange Assurance* (1819), 8 Taunt. 755; *Mount* v. *Harrison* (1827), 4 Bing. 388; *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 124 (Am.).

(*o*) *The Bahia* (1864), Br. & L. 292; *Hansen* v. *Dunn* (1906), 11 Com. Cas. 100.

(*p*) *The Savona* (1900), P. 252; *Embiricos* v. *Reid*, [1914] 3 K. B. 45; *Miller* v. *Taylor* (1915), 31 T. L. R. 272.

(*q*) *See Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, 124 (Am.); *Griswold* v. *New York Insurance Co.* (1808), 3 Johns. R., p. 326 (Am.); *Saltus* v. *Ocean Insurance Co.* (1817), 14 Johns. R., p. 143 (Am.).

(*r*) Cf. *Levy* v. *Merchants Marine Insurance Co.* (1885), 52 L. T. 263.

enter into the consideration whether the latter are or are not liable for an actual total loss of freight. They do not undertake that the wages of the master and crew, and the necessary provisions for the voyage, shall not cost more than the amount of freight to be earned." (*s*) "The underwriters take upon themselves no risk whatsoever, as to the length or duration of the voyage insured. What they undertake is that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured: not that the voyage shall be performed in a longer or a shorter period. The owner takes upon himself the chances of a short or of a protracted passage." (*t*)

The Insurance Company of North America v. *Jones and Clark* (1807), 2 Binn. 547 (Am.),

was an action on a policy of insurance on freight of the brig *Benjamin Franklin*.

FACTS.—The vessel sailed from Bordeaux on a voyage to Philadelphia, but before getting out of the river, was stopped by an embargo, which lasted for nearly three months. The embargo being withdrawn the vessel renewed the voyage and arrived in safety at Philadelphia, where the cargo was delivered and the full freight received. But during the embargo extra expense was incurred for seamen's wages, provisions, etc., and in the present action the shipowner was endeavouring to recover these as a partial loss under the policy.

Held that he could not recover.

Mayo v. *Maine Fire & Marine Insurance Company* (1808), 4 Mass. R. 374 (Am.),

was an action on a policy of insurance upon freight of the *Harriot*.

(*s*) Per BOSWORTH, J., in *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer., p. 216 (Am.); *Allen* v. *Mercantile Mutual Insurance Co.* (1871), 44 N. Y., p. 441 (Am.); *see* also per POLLOCK, C.B., in *Chapman* v. *Benson* (1847), 5 C. B., p. 345.

(*t*) Per STORY, J., in *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 352 (Am.); *see* also *Anderson* v. *Wallis* (1813), 2 M. & S. 240; *Everth* v. *Smith* (1814),

FACTS.—On the voyage to France, the vessel was captured and carried into Plymouth, but after a detention of two months was liberated, proceeded on the voyage, and earned the freight. The plaintiff claimed a partial loss on account of the protraction of the voyage by the capture and detention.

Held that he could not recover. (*u*)

JUDGMENT.—PARSONS, C.J.: "The plaintiff says that if there had been no detention his vessel might have earned her freight in less time. But the underwriters did not insure any particular time in which the voyage should be performed; but only that the freight should be earned. They are not, therefore, answerable for a partial loss arising from the increased length of the voyage by the detention, any more than they would have been, if the arrival of the vessel had been delayed by violent storms, which had driven her out of her course."

The other element to be considered is whether the damage to the vessel can be repaired so as to carry on the cargo to the port of destination at a reasonable cost. The continuation of the adventure and the earning of the freight depend upon the continued existence of the ship. If the vessel is destroyed, then, subject to the shipowner's right to earn the freight by transhipping the cargo, if this course is practicable, the contract of affreightment is dissolved, and if the destruction of the vessel was due to any of the perils covered by the policy, the shipowner will be able to recover from the underwriter for the loss of freight resulting from the loss of the vessel. But the vessel, although seriously damaged, may be physically capable of being repaired, although the cost of the repairs would be commercially unreasonable. What is the position then of the shipowner under the contract of affreightment? "What is the nature of the contract between the shipowner and the merchant whose goods he contracts to carry on freight? The shipowner engages

2 M. & S. 278; *Clark* v. *Mass. Fire Insurance Co.* (1824), 2 Pick. 104 (Am.); *M'Gaw* v. *Ocean Insurance Co.* (1839), 23 Pick. 405 (Am.); *Allen* v. *Mercantile Mutual Insurance Co.* (1871), 44 N. Y. 437 (Am.).

(*u*) In the earlier case of *Herbert* v. *Hallett* (1802), 3 Johns. Cas., p. 100 (Am.), KENT, C.J., suggested that the assured might be entitled to an indemnity for the loss of freight during the time the vessel was necessarily interrupted on the voyage.

to carry the goods from the port of loading to the port of discharge; his contract would be absolute but for the exception introduced into the bill of lading—unless prevented by perils of the sea. Now, when is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary. . . . If the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract." (*x*)

If the vessel is by excepted perils damaged to such an extent as not to be worth repairing, the shipowner, as against the freighter, is entitled to say that he is prevented from completing the voyage, and is released from his obligations under the contract of affreightment. By abandoning the voyage the shipowner loses his right to freight, but if the peril, which caused the damage to the ship and which was excepted from the contract of affreightment, was covered by the policy of insurance, the shipowner will be entitled to recover from his underwriter for the resulting loss of freight. For the underwriter undertakes to indemnify the owner if he is prevented by certain perils from earning the freight, and as between the shipowner and the underwriter the question, whether he has been so prevented, must be decided on the same principles as between the shipowner and the freighter.(*y*) "I think that if there was damage to the ship, such though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss* v. *Smith*, it was unreasonable to do so, the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if under such circumstances, the owner did not in fact repair, the freight was totally lost by the perils insured against." (*z*)

(*x*) Per CRESSWELL, J., in *Moss* v. *Smith* (1850), 9 C. B., p. 105, cited by BOWEN, L.J., in *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 2 Q. B. p. 660; *see* also per WILDE, C.J., in *Moss* v. *Smith*, p. 109; per Lord BLACKBURN in *Shepherd* v. *Henderson* (1881), L. R. 7 A. C., p. 69.

(*y*) Cf. per WILDE, C.J., in *Moss* v. *Smith* (1850), 9 C. B., p. 108.

(*z*) Per BLACKBURN, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 115.

A shipowner is not bound to repair the vessel, if in a business sense of the word it is not possible to do so ; (*a*) or, as it is sometimes said, if the cost of the repairs will exceed the benefit to be derived from them, but there is some uncertainty as to the precise test to be applied in determining whether the shipowner is absolved from further carrying the goods. (*b*) What extent of repairs is to be taken into account, and ought the freight which will be earned by completing the voyage to be considered as part of the benefit to be derived from the repairs ?

What extent of repairs is to be taken into account ? Is it the repairs necessary to make good all the damage sustained by the vessel, or merely the repairs sufficient to enable the vessel to carry the cargo to the agreed destination ? The extent of the repairs to be taken into account when considering whether a vessel is a constructive total loss has been stated in different ways. According to one current of authorities, " where the damage to the ship is so great, from the perils insured against, as that the owner cannot put her in a state of repair *necessary for the pursuing of the voyage insured*, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss." (*c*)

According to another current of authority there would be a constructive total loss if the cost of restoring and repairing the vessel so as to be substantially as good as she was before the accident, would exceed the value of the vessel when repaired.(*d*) The correct view, it is submitted, is that stated by SHEE, J., in the case of *Kemp* v. *Halliday*. (*e*) " The engagement of the underwriter is, that the thing which he insures shall, with reasonable repairs and expenses for which he undertakes, should they be rendered necessary by the

(*a*) Cf. per Lord ESHER, M.R., in *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 2 Q. B., p. 657.

(*b*) *See* Carver, 5th ed., sect. 303.

(*c*) Per TINDAL, C.J., in *Benson* v. *Chapman* (1843), 6 M. & G., p. 810 ; *Moss* v. *Smith* (1850). 9 C. B., p. 103.

(*d*) *See* per Lords WATSON and SHAND, in *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A. C., pp. 603, 612 ; Halsbury, Ency., vol. 17, p. 483 ; *American Insurance Co.* v. *Center* (1827), 7 Cow., p. 580 ; (1829), 4 Wend. 45 (Am.) ; but *contra* per BLACKBURN, J., in *Rankin* v. *Potter* (1873). L. R. 6 H. L., p. 117.

(*e*) (1866), 6 B. & S., p. 741.

perils insured against, reach its destination capable of being used as the thing which it was when the risk commenced." The repairs, the cost of which are to be considered, do not mean a reconstruction, but the vessel is to be repaired so as to be not merely seaworthy, but, as far as repairs can effect it, a vessel of the same classification and as nearly as possible the same thing as she was before. (*f*)

Does the same test apply as between the shipowner and the freighter? In the case of *Assicurazioni Generali* v. *S.S. Bessie Morris Company*,(*g*) COLLINS, J., expressed the view that the standard applied in considering whether there was a constructive total loss of a vessel, was the standard to be applied in deciding the question between the shipowner and the freighter, whether the vessel had been prevented from proceeding on her voyage by the excepted perils,(*h*) and this is, it is submitted, the correct view. "It is clear from *Moss* v. *Smith*, and *Philpott* v. *Swann*, that unless the ship is either irreparable, or repair practically impossible, the shipowner cannot show as against his underwriter that he was prevented from earning the freight through damage to the ship, and the standard of what is practically impossible is the same as that of a constructive total loss. In other words, where the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost." "That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owners as if it had sunk or broken up." (*i*)

(*f*) *North Atlantic S.S. Co.* v. *Burr*, [1904] 9 Com. Cas. 164.

(*g*) [1892] 1 Q. B., p. 580.

(*h*) The statement of Lord ESHER in *Assicurazioni Generali* v. *S.S. Bessie Morris Co.*, [1892] 2 Q. B., p. 658, "the doctrine of constructive total loss can arise only between an underwriter and his assured," does not seem to have been intended to contradict this view, but to have had reference to the contention of the shipowner that, although the voyage was in fact completed, the vessel ought, owing to the cost of the repairs, to be treated for the purposes of the voyage, as a constructive total loss. *See* per BOWEN, L.J., *ibid.*, at p. 660.

(*i*) Per LUSH, J., in *Rankin* v. *Potter* (1870), L. R. 5 C. P., p. 376; cited by MELLOR, J., L. R. 6 H. L., p. 110.

Moss v. *Smith* (1850), 9 C. B. 94; 19 L. J. C. P. 225; 14 Jur., 1003; 82 R. R. 307,

was an action on two policies of insurance, one for £1000 upon the ship *Alfred*, and the other for £1000 on chartered freight of the said ship.

FACTS.—After loading a cargo, which included some eight hundred and fifty tons of guano, the vessel proceeded on the voyage, but owing to bad weather sustained considerable damage and had to put back to Valparaiso, where a survey was held. The expenses and the repairs necessary to enable the vessel to proceed to England were estimated at some £3700, an amount which would exceed the value of the freight, but would be less than the value of the ship when repaired, and the surveyors reported that in view of the difficulty of raising money at Valparaiso and of obtaining the necessary workmen and materials, it would be for the interest of all concerned to sell the ship, and to forward the cargo by other vessels. The ship was accordingly sold for £1700, and the cargo ultimately delivered at an increased cost of freight. The plaintiffs claimed for a loss of the ship and freight.

Held that as the vessel could have been repaired at a reasonable cost and within a reasonable time so as to be able to carry on the cargo, there was no total loss either under the policy on ship or under the policy on freight.

Philpott v. *Swann* (1861), 11 C. B. (N. S.) 270; 30 L. J. C. P. 358; 5 L. T. 183; 7 Jur. (N. S.) 1291,

was an action on a policy of insurance on charter freight on the ship *Greenwich*.

FACTS.—The *Greenwich* was a ship of 260 tons burthen, and had taken on board about 140 tons of copper ore (the remaining 120 tons being ready for shipment) when a storm arose and the vessel was damaged: Instead of going to the Cape of Good Hope, which was some 180 miles away, the master proceeded to St. Helena, a distance of some 1800 miles; and ultimately

finding no facilities there for the necessary repair, and being unable to return to the port of loading without it, he proceeded to Swansea, the port of discharge, with only the 140 tons of ore. The plaintiff sought to recover for the loss of the freight on the 120 tons.

Held that, although the master in going to St. Helena made the choice which a prudent man uninsured would have made, the choice though apparently prudent was mistaken, and that as the damage could have been repaired at the Cape at a reasonable cost and within a reasonable time, the loss of freight was attributable to the action of the master, and not to any of the perils insured against, and therefore that the plaintiff could not recover.

The American Insurance Company v. *Center* (1829), 4 Wendell, 45; (1827), 7 Cowen, 564,

was an action on a policy of insurance on the freight of the ship *Pallas* on a voyage from New Orleans to Havre.

Facts.—On the day after leaving New Orleans the vessel ran aground and was so much damaged that it was necessary to return to New Orleans, where a survey was held. The *Pallas* was a coppered vessel, and the copper was very much injured by the stranding. The cost of recoppering the vessel, together with the other necessary repairs, would have exceeded the value of the vessel when repaired, but the vessel could have been sheathed with wood at a very much lower cost, so as to be seaworthy and competent to perform the voyage to Havre with a full cargo, but the shippers would not consent to this being done, as they had effected insurance on the cargo in a coppered vessel. The cargo was, therefore, delivered back to the shippers, and the vessel was sold.

Held that the shipowner was entitled to have his ship fully repaired, and that as the cost of so doing would exceed the value of the ship when repaired, he could abandon the vessel and could not be required by the shippers to repair for the purpose of sending on the cargo, and consequently that he could recover for a total loss of the freight.

The other question upon which uncertainty exists is, whether the freight, which will be earned by completing the voyage, should be taken into account when considering whether the benefit to be derived from the repairs to the vessel will exceed the outlay necessary to effect them. In the case of *Assicurazioni Generali* v. *S.S. Bessie Morris Company*,(*k*) COLLINS, J., seems to have considered that such freight ought to be taken into account. On the other hand, in the case of *Moss* v. *Smith*, WILDE, C.J., said that "the amount of freight forms no fair ingredient in the inquiry." (*l*) It is not easy to decide between these two views, but, as has been pointed out,(*m*) it seems unreasonable to say that under a contract of affreightment a shipowner must repair the vessel and continue the voyage if he has not received the freight, and need not do so under similar circumstances if he has been paid in advance for the carriage of the goods. On the whole, the better view, it is submitted, is to disregard the freight.

Where owing to the cost of repairs a vessel is treated as a constructive total loss, and there is no chance of an opportunity of the cargo being forwarded at a cost less than the amount of the original freight,(*n*) there is a total loss of freight and notice of abandonment is not required. "Abandonment can have no effect under such circumstances. If the loss, being a loss by damage to the ship, was total in the first instance, no abandonment was necessary; if it was not, abandonment could not make it so." (*o*) And the position of the shipowner, as regards the underwriters on freight, is not affected even though he attempts to repair the vessel, provided that he does not do so. (*p*)

(*k*) [1892] 1 Q. B., p. 578.

(*l*) (1850), 9 C. B., p. 109. The question is whether the cost of repairs will exceed the value of the ship when repaired, and as was stated by BRAMWELL, B. in *Hickie* v. *Rodocanachi* (1859), 4 H. & N., p. 466, "If any question of the ship arose, the insured could not include the freight as an item in the calculation." Cited by BRETT, M.R., in *Sea Insurance Co.* v. *Hadden* (1884), L. R. 13 Q. B. D., p. 714; but *contra* per Lord CAMPBELL, in *Fleming* v. *Smith* (1848), 1 H. L. C., p. 535.

(*m*) Carver, 5th ed., sect. 303.

(*n*) *See* per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 99.

(*o*) Per ALDERSON, B., in *Benson* v. *Chapman* (1849), 2 H. L. C., p. 721; *see* also cases referred to in note (*x*), p. 111, *ante*.

(*p*) *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 116.

In the foregoing remarks an endeavour has been made to ascertain the effect upon an insurance of freight of loss of or damage to the freight-earning vessel by perils of the seas and similar causes. Another question which has to be considered is the effect of capture, seizure, and similar perils. It has been seen (*q*) that where a vessel has been so much damaged by perils of the sea that she cannot be repaired so as to complete the voyage within a reasonable time, the contract of affreightment, subject to the right of transhipment, is dissolved, and this result follows whether the contract is executory or not, and whether the cargo has been loaded or not. Similar results may follow if the prosecution of the voyage is prevented by an embargo. An embargo does not necessarily put an end to the contract of affreightment; it is to be considered as a temporary suspension of it only. (*r*) The embargo, however, may be of such a character as to render the completion of the voyage within a reasonable time impossible or unlikely, and in such cases the contract of affreightment may be treated as at an end and the adventure may be abandoned.(*s*) The fact that subsequent events show that the delay would have been of but short duration is immaterial except perhaps as a test of what was the true state of things at the time when the decision to treat the adventure as at an end was made.(*t*) Commercial men cannot be expected to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not: they are entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds. (*u*)

The effect of capture upon a contract of affreightment is doubtful. There is authority for the view that capture puts an end to the

(*q*) *Ante*, pp. 135–145.

(*r*) *See Hadley* v. *Clarke* (1799), 8 T. R. 259; *Touteng* v. *Hubbard* (1802), 3 B. & P. 291; *Beale* v. *Thompson* (1804), 4 East, 546; *Melville* v. *De Wolf* (1855), 4 E. & B. 844; *Beal* v. *Horlock* (1915), W. N. 234.

(*s*) *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404; *Embiricos* v. *Reid*, [1914] 3 K. B. 45; *Sanday* v. *British Marine Insurance Co.* (1915), 31 T. L. R. 374.

(*t*) Per BARNES, J., in *The Savona*, [1900] P., p. 259; *Miller* v. *Taylor* (1915), 31 T. L. R. 272.

(*u*) Per SCRUTTON, J., in *Embiricos* v. *Reid*, [1914] 3 K. B., p. 54. An embargo put on in time of war and likely to continue during the war will, it would seem, entitle the parties to treat the contract of affreightment at an end. "A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this." *Geipel* v. *Smith* (1872), L. R. 7 Q. B., p. 414.

contract,(*x*) and there is authority for the view that it does not.(*y*) The effect is probably to put an end to the contract and to release the parties from their obligations, if the capture takes place under circumstances which render the completion of the voyage impossible or unlikely. (*z*) If a vessel, which has been chartered to proceed to a port and load a cargo, is captured under circumstances which render it unlikely that the vessel will be able to perform the voyage, the merchant will not be bound to wait for an indefinite period to see if the vessel is recaptured or released. He will be entitled to rely on the facts as they appear, and to say to the shipowner, "There is no reasonable prospect of your ship being able to perform the voyage within a reasonable time. I must make arrangements to have my cargo carried, and as your vessel cannot do this, I must treat the contract between us as at an end." Similarly, the shipowner may under such circumstances treat the contract as no longer binding. In such cases the contract is dissolved not by the act of the parties, but by the force of circumstances. The declaration of either party that he intends to regard the contract as at an end is not the exercise of an option; it is merely a declaration that in his opinion circumstances have arisen which render the contract no longer binding. Until this position is acquiesced in by the other party to the contract, he may perhaps withdraw, but if this position is accepted and is justified by the facts, the contract of affreightment comes to an end, and it comes to an end not because the parties to it agree that it shall, but because, as they recognise, the circumstances have rendered it impossible or unlikely that it can ever be carried out. Similar principles, it is submitted, apply in cases where at the time of the capture the cargo has been loaded. Difficulties may, however, arise in the application of these principles owing to the fact that within a short time of the capture the vessel may be unexpectedly recaptured or released with the cargo still on board. What is then the position of a shipowner who has declared his intention of treating the adventure as at an end? The position seems to be similar to the position which arises when a vessel has been abandoned at sea owing

(*x*) *Goss* v. *Withers* (1758), 2 Burr., p. 696; *Curling* v. *Long* (1797), 1 B. & P. p. 637; *The Friends* (1801), 4 C. Rob., p. 144.

(*y*) *Beale* v. *Thompson* (1804), 4 East, p. 560; *The Nathaniel Hooper* (1839), 3 Sumner, p. 557 (Am.). *See* also Carver, sect. 242; Parsons, Shipping, vol. 1, p. 336.

(*z*) *Polurrian S.S. Co.* v. *Young*, [1915] 1 K. B. 922.

to perils of the seas.(*a*) If the shipowner was justified in his attitude, then, subject to a *locus penitentiæ* in the event of the other party to the contract failing to acquiesce, the contract of affreightment will be dissolved, and if the vessel comes again into the control of the shipowner with the cargo on board, the contract of affreightment will not revive. Circumstances may arise under which the shipowner will be entitled to a *quantum meruit* freight, but in the absence of any special circumstances, the freighter will be entitled to his goods without becoming liable to pay any freight.

What is the position as between the shipowner and the underwriter on freight? If the circumstances are such as to justify the conclusion that owing to the embargo or the capture the completion of the adventure is impossible or unlikely, and if the parties to the contract, recognising this, treat the contract as at an end, the shipowner will lose his freight, and, as has been pointed out, he will lose his freight not by the agreement of the parties but by the force of circumstances. In such a case he will, it is submitted, be entitled to recover from the underwriter on freight under a policy in the ordinary form, (*b*) but as the vessel may be recaptured or released and may earn freight on the insured voyage, the assured should give notice of abandonment. He is then, so long as the loss continues apparently total, in a position to bring an action against the underwriters on freight, and if an action is commenced before any change in the situation occurs, he will be able to recover as for a total loss. If no action is commenced, and the ship being recaptured or released comes again under the control of the assured and performs the voyage and earns freight, the assured will not be entitled to treat the loss which has ceased to be total as a total loss merely because he has given notice of abandonment. "In cases of capture or detention, where the loss is apparently total, abandonment to the underwriters on freight may be very important; but even in such cases, if the ship is retaken or released, and freight earned before action brought, the owner cannot recover on the policy on freight." (*c*)

(*a*) *See The Kathleen* (1874), L. R. 4 A. & E. 269; *The Cito* (1881), L. R. 7 P. D. 5; *The Leptir* (1885), 52 L. T. 768; *The Arno* (1895), 8 Asp. M. C. 5; *Guthrie* v. *North China Insurance Co.* (1902), 7 Com. Cas., p. 136; *The Eliza Lines* (1905), 199, U. S. Rep. 119 Am.). *See* also the *Florence* (1852), 16 Jur. 572.

(*b*) It is assumed that the policy does not contain the warranty f.c.s.

(*c*) Per ALDERSON, B., delivering the opinion of the Judges in *Benson* v. *Chapman* (1849), 2 H. L. C., p. 721.

Bainbridge v. *Neilson* (1808), 1 Camp. 237; 10 East, 329; 10 R. R. 316,

was an action upon a policy of insurance upon the ship *Mary*, and also upon another policy of insurance upon the freight of the same ship, from Jamaica to a port of discharge in Great Britain.

FACTS.—The vessel after leaving Jamaica was captured on the 21st September, 1807, and was recaptured on the 25th. On the 30th September the plaintiffs received news of the capture but not of the recapture, and on the following day they gave notice of abandonment to the respective underwriters. On the 6th October they received the first intelligence of the recapture of the vessel, and that she then lay at a port in Ireland in safety in the possession of the recaptors. The plaintiffs, while persisting in their abandonment, offered to do their best for the benefit of those who should be ultimately concerned in the vessel. They compromised with the recaptors, completed the voyage, and received the freight. The salvage charges on the ship amounted to £15 4*s.* 8*d.*, and on the freight to £13 11*s.* 5*d.* per cent. of the sum insured.

Held that the plaintiffs could only recover for a partial loss.

The position as between the shipowner and the underwriter on freight is usually complicated by the fact that the vessel will have been insured and may have been abandoned to the underwriters on ship. Now freight is the benefit derivable from the employment of a ship, and in so far as the earning of freight depends upon the continued use and employment of the ship, it follows, as an incident, the property in the ship passes to the underwriters on ship under an abandonment. The underwriter on ship "does not become privy by virtue of such abandonment to any existing charterparty, nor perhaps to any contract of affreightment before made with the owner; but I think that by the abandonment he acquires possession of the thing from the use of which freight is to be earned. . . . An abandonment to the underwriter on ship, transfers to him not merely the hull but the use of the ship, and the advantages resulting from the

completion of the voyage." (*d*) My Lords, I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due but not earned at the time of the disaster is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship who before the freight was completely earned had taken possession of the ship." (*e*) An abandonment of the ship carries with it the right to any freight earned by the ship subsequent to the abandonment or to the time to which the abandonment relates,(*f*) and this freight passes not to the underwriters on freight, but to the underwriters on ship. It follows, therefore, that the position of an underwriter on freight may be affected by the fact that the ship is also insured and has been abandoned to the underwriters on ship.

There is an impression, based on the case of *M'Carthy* v. *Abel*,(*g*) that in all cases of capture and seizure abandonment to the underwriters on ship prevents the assured from recovering for a loss of freight. But in the case of *M'Carthy* v. *Abel*, as has been pointed out,(*h*) the abandonment of the ship was not justified, and the position, which arose in that case, is quite different from the position which arises when, owing to capture or to some similar peril rendering the completion of the voyage impossible or unlikely, the contract of affreightment is justifiably treated as at an end. In this latter case when the contract is terminated, the freight payable under it is lost and it is lost because the capture or seizure makes it impossible from a commercial point of view to earn the freight. The same circumstances may also justify the shipowner in abandoning the ship to the underwriters on ship, and he may adopt this course, but in such case it would not be correct to say that it is the abandonment of the ship which causes the loss of the freight.

(*d*) Per Lord ELLENBOROUGH in *Case* v. *Davidson* (1816), 5 M. & S., p. 82.

(*e*) Per Lord BLACKBURN in *Simpson* v. *Thomson* (1877), L. R. 3 A. C., p. 292; *see* also *Keith* v. *Burrows* (1877), L. R. 2 A. C., p. 656.

(*f*) *Stewart* v. *Greenock Marine Insurance Co.* (1848), 2 H. L. C. 159; Marine Insurance Act, sect. 63 (2).

(*g*) (1804), 5 East, 388, *ante*, p. 132.

(*h*) *Ante*, p. 133.

And, it is submitted, the assured will be entitled to recover for the loss of freight, although the contract of affreightment is not by any definite act of the parties to it treated as at an end, and although the vessel being unexpectedly recaptured or released, completes the voyage and earns freight. The underwriter on freight undertakes to indemnify the assured if by reason of the loss of the ship by perils insured against, he is prevented from earning freight. Under the circumstances which are here being supposed, the shipowner would be justified in treating the loss of the ship as a total loss. The result of treating the ship as a total loss will be to put it out of the power of the assured to receive any freight which the vessel may earn, but in the same way as a shipowner, who has justifiably abandoned his ship by reason of the extent of damage caused by perils of the sea, is entitled to say that he is prevented from earning freight even though freight is in fact subsequently earned by the vessel, so, it is submitted, a shipowner who has justifiably abandoned his vessel by reason of capture or some similar cause, is entitled to say that he is prevented from earning freight even though freight is subsequently earned. It may be argued that but for the abandonment to the underwriters on ship, the shipowner would, upon the release of the vessel, have again obtained control of her and would have received the freight, and that therefore the loss of freight to the assured is due not to the capture but to the abandonment. The proximate cause, however, of the loss was the capture, and if once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored or has the means of obtaining such restoration. (*i*) The shipowner does not have the means of obtaining restoration (*k*) if he has justifiably abandoned to the underwriters on ship, (*l*) and as,

(*i*) Cf. per Lord CAMPBELL, C.J., in *Dean* v. *Hornby* (1854), 3 E. & B., p. 190; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Lozano* v. *Janson* (1859), 2 E. & E. 160.

(*k*) It is assumed that the abandonment has been accepted, or that an action has been commenced.

(*l*) It must also be remembered that the principle that an assured, who has given notice of abandonment, cannot recover for a total loss if the loss ceases to be total before action brought, is based on the view that a policy of insurance is intended to be a contract of indemnity, and that an assured cannot recover for a greater loss than he has sustained. If the conclusion above put forward is correct, the assured will not recover more than he has lost, whereas if the contrary view is the true one, he will in many cases be deprived of an indemnity. In

ex hypothesi, he was justified in treating the vessel as a constructive total loss the underwriter on freight cannot complain because he has so treated it. "The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship and is justified in so doing; for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." (*m*)

The actual loss of the cargo usually causes a total loss of the freight payable in respect of it.(*n*) By the loss of the cargo the shipowner loses the freight stipulated for its carriage, and he cannot under ordinary circumstances call upon the shipper or charterer to load other cargo in its place. (*o*) It has already been seen (*p*) that where "freight is insured on a particular voyage, by a particular vessel, and the cargo has been put on board, it is the freight of that cargo, in that vessel and on that voyage which is the subject of insurance, and to which the policy attaches." A loss of that freight by any of the perils insured against will *primâ facie* involve a total loss of freight under the policy. "An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured." (*q*) Although the shipowner may thus lose the freight which he contemplated that his ship would earn in the course of the voyage insured, the ship may still be able to make the voyage, and to earn freight in the course of it. Such freight is in the nature of salvage, (*r*) and the shipowner is entitled

the foregoing remarks it has been assumed that no change has been made by the Marine Insurance Act in the effect of a notice of abandonment, but *see* Arnould, sect. 1097A.

(*m*) Per TINDAL, C.J., in *Benson* v. *Chapman* (1843), 6 M. & G., p. 810. In practice the question is not likely to arise frequently in the future, as most policies on hull contain the Institute Clauses, which provide that "In the event of total or constructive total loss, no claim to be made by the underwriters for freight whether notice of abandonment has been given or not."

(*n*) The freight may be payable irrespective of what happens to the cargo.

(*o*) *Weir* v. *Girvin*, [1900] 1 Q. B. 45.

(*p*) *Ante*, p. 105.

(*q*) Per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 99.

(*r*) Phillips, sect. 1644; Parsons, Insurance, vol. 2, p. 167; Gow, Insurance, p. 165; Lowndes, Insurance, p. 146; *Green* v. *Royal Exchange Assurance Co.* (1815), 6 Taunt. 68; *Gayner* v. *Sunderland Association* (1884), C. & E. 293.

to any expenses incurred for the express purpose of obtaining it. (*s*) Freight so earned has the effect of reducing the shipowner's loss on the voyage, and after it has been received, he will only be able to recover as for a partial loss. (*t*) If he wishes to recover for a total loss, he should, while the loss is still total, give due notice of abandonment and commence an action against the underwriter on freight. "If the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight." (*u*)

The underwriter is entitled to have the benefit of any other freight earned on the voyage insured, and this raises the difficult question whether the voyage ultimately made by the vessel is the voyage insured. The fact that the ports of loading and discharge are the same does not necessarily make it the same voyage, (*x*) but the fact that the ports are different will prevent it from being the same. (*y*) It has been suggested (*z*) that in the case of a ship belonging to a line sailing on stated dates, if the vessel is prevented from sailing on the day intended but makes a voyage on a subsequent occasion, the subsequent voyage would not be the same voyage as that originally contemplated. But in the case of *The Scottish Shire Line* v. *London & Provincial Marine Insurance Company*, (*a*) where a vessel, belonging to a line and employed in making round voyages to Australia and back according to a programme, was delayed, after starting on a

(*s*) *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Sharp* v. *Gladstone* (1805), 7 East, 24.

(*t*) Cf. *Everth* v. *Smith* (1814), 2 M. & S. 278, *ante*, p. 93.

(*u*) Per BRETT, J., in *Rankin* v. *Potter* (1873), L. R. 6 H. L., p. 103.

(*x*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P., p. 141; *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer., p. 226 (Am.); *Parsons* v. *Manufacturers Insurance Co.* (1860), 16 Gray, p. 470 (Am.).

(*y*) Per STORY, J., in *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 351 (Am.); *see* also *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 124 (Am.). If the policy indicates alternative ports of discharge, the fact that the vessel sails with the substituted cargo to one of these ports which is different from the port to which it would have sailed with the original cargo, does not necessarily make it a different voyage.

(*z*) Lowndes, Insurance, p. 147.

(*a*) [1912] 3 K. B. 51.

voyage, for three months, and consequently missed the dates arranged but ultimately completed a round voyage, HAMILTON, J., expressed the opinion that the voyage actually made came within the description in the policy and that the underwriter on freight was entitled to rely on the fact that freight had been earned in the course of it. If the voyage which the vessel actually makes is not the voyage contemplated, the underwriters on freight will not be entitled to avail themselves of freight earned in this new voyage. "I know of no principle or authority upon which the Court can say that the underwriters have a right to avail themselves of a freight earned on a voyage, which they have not insured, by way of recompense for losses on another voyage which they have insured, and which has already terminated." (*b*) If the shipowner can complete the voyage and earn freight in the course of it, but neglects to do so, the underwriters on freight will not be prejudiced by his failure to adopt this course.

Gayner v. *The Sunderland Joint Stock Premium Association* (1884), Cab. & Ell. 293,

was an action on a policy of insurance for £300 on freight of the *Foxglove*, valued at £1200, at and from Sunderland to Valparaiso.

FACTS.—The plaintiffs had shipped at Sunderland on their own account a cargo of coals, and while the vessel was still in port with the coals on board, waiting to proceed on her voyage, she was run into by the *Acacia*, who was alone to blame. The cargo was discharged, and owing to the damage it had received could not be shipped again, and it was admitted by the defendants that that particular adventure had been determined. The *Foxglove* was detained at Sunderland for repairs—all the expenses of repairs and demurrage being paid by the owners of the *Acacia*, who also when the *Foxglove* was again ready to put to sea offered to put on board free of expense a similar cargo of coals for Valparaiso. This, however, the plaintiffs refused, and the *Foxglove* sailed with a cargo of coals for Algoa Bay. The plaintiffs claimed a total loss of the freight.

(*b*) Per STORY, J., in *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 351 (Am.); per BLACKBURN, J., in *Barber* v. *Fleming* (1869), L. R. 5 Q. B., p. 66.

Held that they could not recover, as freight equivalent to the freight insured either had been or might have been earned.

If the cargo is not wholly destroyed, but is so much damaged by the perils insured against that it cannot be carried on without endangering the health or lives of the crew or the safety of the ship, the shipowner may jettison or abandon it, and this constitutes a total loss of the freight payable in respect of such cargo.(*c*) If the cargo is damaged to such an extent that it cannot be carried to the port of destination so as to arrive in specie, the shipowner, as has been seen,(*d*) loses his right to retain it, and thereby loses his right to the freight payable in respect of it. In this case if the damage to the goods was due to any of the perils covered by the policy, the assured can recover for the resulting loss of freight.(*e*) But if the cargo although greatly damaged can be reconditioned at a reasonable expense, so as to be capable of being carried in specie to the port of destination within a reasonable time, the shipowner may retain it, and if he fails to do so, and thereby loses the freight, he cannot claim from the underwriters for a loss which was caused, not by any of the perils insured against, but by his own voluntary action. (*f*)

In determining whether cargo can be reconditioned so as to be capable of being carried to its destination in specie, two questions have to be considered, the question of expense and the question of time. With regard to the question of expense, if the cost of reconditioning the cargo would exceed the value of the cargo on arrival at the port of destination, the cargo owner need not incur it, and the shipowner would not be authorised to do so on his behalf. In such a case the damaged cargo is from a commercial point of view irreparable and need not be repaired. But as, *ex hypothesi*, the cargo cannot be carried to its destination so as to arrive in specie unless some repairs are effected, and as no repairs need or will be effected, it

(*c*) Phillips, sect. 1642; Parsons, Insurance, vol. 2, p. 166; *Whitney* v. *New York Firemen's Insurance Co.* (1820), 18 Johns. R. 208 (Am.); *Hugg* v. *Augusta Insurance Co.* (1849), 7 How. 595 (Am.); cf. *Dyson* v. *Rowcroft* (1803), 3 B. & P. 474; *Michael* v. *Gillespy* (1857), 2 C. B. (N. S.), p. 644; *The Knight of St. Michael*, [1898] P. 30; *Iredale* v. *China Traders Insurance Co.*, [1900] 2 Q. B., p. 518.

(*d*) *Ante*, p. 137.

(*e*) Phillips, sect. 1642, and cases cited above in note (*c*); *see* also *Hill* v. *Wilson* (1879), L. R. 4 C. P. D. 329.

(*f*) Cf. *Rosetto* v. *Gurney* (1851), 11 C. B. at p. 187.

follows that the freight on this cargo will be lost, and for this loss, if attributable to any of the perils covered by the policy, the assured is entitled to recover from the underwriter on freight.

Michael v. *Gillespy* (1857), 2 C. B. (N. S.) 627; 26 L. J. C. P. 306; 3 Jur. (N. S.) 1219; 109 R. R. 809,

was an action on a time policy of insurance on freight, issued by a mutual insurance association.

FACTS.—The plaintiff was the owner of the *Charles Kerr*, which sailed from Shields with a cargo of coals for Aden, but owing to damage caused by a storm had to put into Cuxhaven for repairs. The coals were unloaded and were found to be so impregnated with deliquescent salts that it would have been extremely dangerous, owing to their liability to spontaneous combustion, to carry them on in their then state to Aden, and owing to the want of facilities at Cuxhaven, it would have cost more than three times their value at Aden to free them from the salts by washing, which alone would have enabled them to be carried with safety. Under the circumstances the coals were abandoned, and the vessel after being repaired, proceeded upon another voyage.

Held that as the cargo had been so damaged by one of the perils insured against in the course of the voyage as to render it impossible—except at an expense which would greatly exceed its value on arrival—to carry it to its destination, the assured was entitled to recover.

While the principle is well established that, if the cost of reconditioning the goods will exceed the value of the goods on arrival at the port of destination, the goods may be treated as being irreparable, it is not clear what is included in the cost of reconditioning. The test usually laid down is whether the cargo can be reconditioned so as to arrive in specie, and this suggests that the cost contemplated is merely the cost of putting the cargo into such a condition as will enable it to arrive in specie, but the correct view, it is submitted, is that the owner of the cargo is entitled to have the cargo put as nearly as possible into the same condition as it was before the accident

so far as repairs can bring this about. "It would have been the duty of the master to ascertain whether the cost of unloading the cargo from the original ship, of drying and *restoring* it, and of transhipping it upon a new bottom, the original ship not being reparable, would, in the aggregate exceed the value of the restored cargo at its place of destination. If it would, then it would not have been practicable to deliver the cargo in a marketable state at its port of destination." (*g*)

It is also doubtful how far any freight that will be payable for the goods ought to be taken into account. In the case of *Rosetto* v. *Gurney*, where the ship was wrecked and the goods had been damaged in the course of the voyage, and the owner was claiming as for a constructive total loss on the ground that they could not be repaired and carried on except at a cost exceeding their value on arrival, the Court held that the amount payable under the original contract of affreightment should not be included. This decision has been the subject of much criticism, but when the matter is considered from the point of view of the shipowner and the cargo owner, it seems correct that such freight should not be taken into account when considering whether the cargo can be reconditioned or not. The shipowner has the right and the duty to carry on the goods to the port of destination unless prevented by something happening to the ship or the cargo and covered by the exceptions in the contract of affreightment. If the cargo is destroyed, it is clear that he is prevented from completing the voyage, and the same result follows if the cargo, although in existence, is damaged to such an extent that either physically or commercially it cannot be repaired. But if it can be repaired and the ship can carry it to the port of destination, it follows that nothing has happened to prevent the adventure from being carried out, and the parties must be prepared to complete it. The result of the voyage being completed is that the cargo owner will be liable to pay the freight stipulated in the contract of affreightment, but the fact that the cargo owner may become liable to pay freight for the carriage of the goods ought not to be taken into account when considering whether the goods are capable of being repaired, any more than the fact that he may have bound himself to deliver them under an unprofitable contract of sale.

(*g*) Per JERVIS, C.J., in *Rosetto* v. *Gurney* (1851), 11 C. B., p. 187. As to the test applied in the case of damage to the ship, *see ante*, p. 150.

The other element to be considered is whether the cargo can be reconditioned so as to be carried to the port of destination within a reasonable time. What is meant by a reasonable time in this conjunction? It has been seen (*h*) that in connection with the repairs to the vessel, any delay is considered reasonable, which is consistent with the character and objects of the adventure, and that in considering whether the delay is reasonable, the circumstances existing in each case must be considered. As between the shipowner and the shipper the separate interests of the latter are not taken into account, even though the delay may cause him considerable loss and may defeat the object which he had in view when entering into the contract. Similar principles should apply where the delay is due to the necessity of repairs to the cargo, and, it is submitted, similar principles do apply in this case. The primary duty of the shipowner is to carry the cargo to the agreed place of destination in his own ship, (*i*) and this duty he must perform by all practicable and reasonable means. If the cargo can be reconditioned so as to be fit to be carried to the port of destination within such a time as, taking everything into consideration, is consistent with the purposes of the contract of affreightment and the character and objects of the adventure, (*k*) the shipowner must wait. He must be prepared to forward the cargo in his vessel as soon as it is in a condition to be reshipped, and if he voluntarily arranges with the shipper to cancel the contract and relinquish the voyage, he cannot hold the underwriter liable for the resulting loss of freight. "The ship was repaired and capable of taking on board the cargo within a reasonable time (six weeks). The master had a right to require that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment.

(*h*) *See ante*, p. 135.

(*i*) See *Shipton* v. *Thornton* (1838), 9 A. & E., p. 333; *Rosetto* v. *Gurney* (1851), 11 C. B., p. 187; *Cargo ex Hamburg* (1863), 2 Moo. P. C. (N. S.), p. 319; *Svendsen* v. *Wallace* (1885), L. R. 10 A. C., p. 417.

(*k*) As to the elements to be considered, compare the language of WILLES, J., in *Notara* v. *Henderson* (1872), L. R. 7 Q. B., p. 237. "The place, the season, the extent of the deterioration, the opportunity or means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience, must be taken into account."

The delay arising thereby would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shows, that the cargo could have been dried, sorted, and repacked safely for the voyage, and at the farthest within *six months*. Mere delay in the voyage, or disappointment as to the time of arrival, constitutes, as we have seen, no ground for an abandonment of the voyage. So that, here the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against." (*l*)

Mordy v. *Jones* (1825), 4 B. & C. 394; 6 D. & Ry. 479; 3 L. J. (o. s.) K. B. 250; 28 R. R. 305.

was an action on a policy of insurance on freight of the ship *Isabella*, at and from Kingston in Jamaica to Liverpool.

FACTS.—In the course of the voyage the vessel was damaged and had to put back to Kingston, where she was soon repaired. The cargo, which consisted of various goods shipped by various persons under bills of lading in the usual terms, had to be relanded, and a part of it was so wetted by sea water that it could not be reshipped without danger from ignition to the ship and the rest of the cargo, unless it underwent a process of washing and drying which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the shippers refusing to interfere but approving of a sale by the master, the master sold the damaged goods, and finding that he could not obtain other

(*l*) Per STORY, J., in *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 354 (Am.); *see* also per SHAW, C.J., in *Lord* v. *Neptune Insurance Co.* (1857), 10 Gray, p. 125 (Am.). The view that the shipowner may be under a duty to wait, after the repairs to the vessel have been completed, is contrary to the opinion expressed by COCKBURN, C.J., in the case of *Notara* v. *Henderson* (1870), L. R. 5 Q. B., p. 354. In this case, however, the cargo could have been carried without any reconditioning to the port of destination, and the question was not whether the shipowner must wait while cargo is being reconditioned for the purpose of making it fit to continue the voyage, but whether he must wait while steps are being taken to repair the damage which the cargo has suffered.

goods to complete his cargo in any reasonable time, and being pressed by the shippers of the rest of the cargo to proceed, he sailed for Liverpool. The proceeds of the sale were paid to the parties interested, without any deduction of freight, and the present action was brought to recover the freight so lost.

Held that the plaintiff could not recover. (*m*)

Jordan and Others v. *Warren Insurance Company* (1840), 1 Story, 342 (Am.),

was an action on a policy of insurance on the freight of the ship *Franklin*.

Facts.—While proceeding down the river Mississippi, on a voyage from New Orleans to Havre, the vessel sustained considerable damage and had to put back for repairs, which were completed in about six weeks. A portion of the cargo was lost, and the great bulk of it, consisting of cotton, was wet and very liable to spontaneous combustion, but it could by a process of drying, sorting, and repacking, have been put in a state for reshipment. But the process was slow and according to some of the witnesses would occupy as long as six months. The cargo was sold, and the shipowner sought to recover for a total loss of freight.

Held that, except as to the goods which had been lost, he could not recover, as he might have retained the goods until they were made fit for the voyage, and might have then completed the voyage and earned the freight, and the loss of the freight was not due to any of the perils insured against, but to his own default.

Lord v. *The Neptune Insurance Company* (1857), 10 Gray, 109,

was an action on a policy of insurance on freight of the barque *Dana*, at and from New York to Havre.

(*m*) The grounds of the decision are not very satisfactory, but in America this case has always been regarded as an authority for the principle now being discussed.

FACTS.—Three days after leaving New York the vessel sprung a leak and had to put back for repairs, which were soon completed. The cargo, which had to be discharged in order to repair the vessel, was more or less damaged, and was not fit for reshipment, but after a process of drying and preparation which would have taken several months, a part of it might have been reshipped and would have arrived at Havre, much deteriorated in value, but capable of being delivered in specie. The owners of the several parts of the cargo, which consisted principally of wheat, flour, and green hides, refused to give any instructions with regard to the goods, in consequence of which the master sold them, and the proceeds came into the hands of the shipowners. The latter refused to pay over these proceeds to the respective owners of the goods without the payment of the freight on them, but in an action brought against them it was held that they were not entitled to deduct any freight. The present action was, therefore, brought to recover a total loss of the freight.

Held that the shipowners could not recover for a total loss, but only for a partial loss in respect of the freight payable on goods which could not be made fit for the voyage.

If the cargo cannot be reconditioned in time to be reshipped by the original vessel, it is doubtful whether the shipowner may retain it in order to earn his freight by carrying it in another vessel. The option of the shipowner to earn his freight by transhipping the cargo is usually expressed to be limited to those cases where the cargo cannot be carried to its destination in the original vessel owing to damage to the vessel. There does not seem to be any authority that this option extends also to cases where the failure to carry the cargo to its destination is due, not to the condition of the vessel, but to the condition of the cargo, and there does not seem to be any valid reason why, in such cases, an option should be given to the shipowner. If, therefore, cargo is damaged and cannot be reconditioned in time to be reshipped by the original vessel, the shipowner will lose the freight payable in respect of it. If owing to perils insured against the cargo cannot be reconditioned so as to be carried to the

port of destination within a reasonable time, and there is no chance of obtaining a substituted cargo, the shipowner will be entitled to recover for the loss of freight thus caused, and, it is submitted, need not give notice of abandonment.

In the foregoing remarks an endeavour has been made to state the principles applicable to freight payable in respect of particular goods and dependent upon their carriage. The freight, however, may be independent of considerations affecting the cargo, as in the case of chartered freight before the goods are put on board, and under certain circumstances in the case of lump-sum freight. In the case of chartered freight, before the goods are shipped, the loss can occur solely by reason of damage to the ship. (*n*) A total loss of the ship involves an absolute total loss of the freight, and the same result follows if the vessel, although not totally lost, is damaged to such an extent that she cannot be repaired except at a cost exceeding her value when repaired, or after a delay that would frustrate the adventure contemplated by the contract of affreightment.

Barber v. *Fleming* (1869), L. R. 5 Q. B. 59; 10 B. & S. 879; 39 L. J. Q. B. 25; 18 W. R. 254,

was an action on a policy of insurance from Bombay to Howland's Island, and thence to the United Kingdom, on freight chartered or otherwise in the ship *Cambodia*.

FACTS.—The vessel had been chartered for a voyage from Howland's Island to the United Kingdom, and in the course of the voyage to Howland's Island she ran ashore on the coast of New Zealand. Surveys were held, and the captain endeavoured to borrow money for repairs, but was unable to get any except on a bottomry bond at 35 per cent., and on the condition that the captain should charter the vessel to the lender for a cargo of timber from New Zealand to England. Communication was made to the owners in England; they refused to allow any repairs to be done, and gave notice of abandonment to the underwriters on ship and freight. The money, which had been in

(*n*) *See Rankin* v. *Potter* (1873), L. R. 6 H. L., per BRETT, J., at p. 103; per BRAMWELL, B., at p. 133.

the meantime advanced, was insufficient for the repairs, and the underwriters on ship decided that the best thing to do was to abandon the ship to the holder of the bottomry bond, and this was done. About eighteen months after the disaster the ship came home with the cargo of timber.

Held that as the ship could not have been repaired so as to have gone to Howland's Island, there was a total loss of the chartered freight.

Rankin v. *Potter and Others* (1873), L. R. 6 H. L. 83; 29 L. T. 142; 42 L. J. C. P. 169; 22 W. R. 1; 2 Asp. M. C. 65,

was an action on a policy of insurance on homeward chartered freight of the *Sir William Eyre*, at and from the Clyde to Southland, while there, and thence to Otago (New Zealand), and for thirty days in port there after arrival.

Facts.—While the vessel was proceeding to New Zealand with a cargo, a charterparty was made under which the vessel after discharging the cargo, was to proceed to Calcutta, and there being tight, staunch, and strong, and in every way fitted for the voyage, take in a cargo and bring the same to England. On the voyage to New Zealand the vessel took the ground. A survey was held, but as there was no dry dock the real nature and extent of the damage which the vessel had sustained could not be discovered. Under the belief that the vessel had not been seriously injured, the master after some delay, proceeded to Calcutta in ballast. On arrival at Calcutta a survey in dry dock was held, and it was then found that, in consequence of the damage sustained at the time when she took the ground, the vessel had been so much damaged that she could not be made seaworthy and fit to bring home a cargo, except at a cost which would exceed the value of the vessel when repaired.

Held that the assured could recover for a total loss of the charterparty freight, as the freight had been lost by perils of the seas during the voyage covered by the policy, and notice of abandonment was under the circumstances not necessary.

Jackson v. *The Union Marine Insurance Company* (1874), L. R. 10 C. P. 125; 31 L. T. 789; 44 L. J. C. P. 27; 23 W. R. 169; 2 Asp. M. C. 435.

was an action on a policy of insurance for £1500 on chartered freight of the *Spirit of the Dawn*, valued at £2900, at and from Liverpool to Newport and thence to San Francisco.

Facts.—A charterparty had been made under which the vessel was to proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails. The vessel sailed from Liverpool and on the following day ran aground. At the trial the jury found that "the time necessary to get the ship off and repair her so as to be a cargo carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers." A few weeks after the accident the charterers chartered another vessel by which they forwarded the rails, and six months later the vessel was sold.

Held that the assured were entitled to recover, as the adventure contemplated by the contract of affreightment was frustrated by reason of the delay, and there was therefore a loss of the chartered freight by perils of the sea. (*o*)

It may be that, although the vessel can within a reasonable time and at a reasonable cost be repaired so as to make the insured voyage, she cannot be repaired so as to bring home any of the cargo for which she was chartered. In such a case there is *primâ facie* a total loss of freight, but the loss is not necessarily total, as the assured may be able to earn other freight on the voyage insured. If, however, the assured gives due notice of abandonment, and the notice is accepted or an action commenced, he will be entitled to recover as for a total loss. If the abandonment is not accepted and an action is not commenced, then the right of the assured to recover, and the extent to which he may recover, will depend upon

(*o*) *See* also *In re Jamieson & Newcastle S.S. Freight Insurance Association*, [1895] 2 Q. B. 90, *post*.

whether other freight has been earned (*p*) or could have been earned on the voyage insured, (*q*) and upon the amount of such other freight.

If the vessel cannot be repaired so as to carry the whole of the contemplated cargo, but can be repaired so as to carry a portion, and the circumstances are not such as to entitle the assured to treat the vessel as a total loss, there will, it would seem, be only a partial loss of freight. (*r*)

Lump-sum freights are found—broadly speaking—in two different kinds of contracts of affreightment. Under the one kind of contract the shipowner charters his vessel for a specific voyage and agrees to place at the disposal of the charterer the full carrying capacity of the vessel and to carry the cargo which may be provided by the charterer, and in return he stipulates for a lump-sum freight, which is usually made payable upon the right and true delivery of the cargo. In the other kind of contract, the shipowner charters his vessel for a certain period of time, and while his obligations may be the same as under the former kind of contract, the payment of the freight is not made to depend upon the delivery of the cargo, but is made payable at a certain rate for the time that the vessel is actually on hire. Under both kinds of contracts the rights of the shipowner to the freight depend upon the particular terms of the contract of affreightment, and it is therefore difficult to lay down any general propositions as to what constitutes a loss of such freight. Under the first kind of contracts, where the freight is made payable on the right and true delivery of the cargo, these words are not taken literally. (*s*) The whole lump freight is payable although a portion of the cargo is lost by excepted perils without any default on the part of the shipowner,(*t*) and it may perhaps also be payable although the non-delivery is wrongful and is due to causes not excepted by the

(*p*) *See Scottish Shire Line, Ltd.* v. *London & Provincial Marine Insurance Co.*, [1912] 3 K. B., p. 68 ; *Everth* v. *Smith* (1814), 2 M. & S. 278.

(*q*) *See ante*, p. 96.

(*r*) Cf. *Green* v. *Royal Exchange Assurance* (1815), 6 Taunt. 68.

(*s*) Per Lord LINDLEY, in *Williams* v. *Canton Insurance Office, Ltd.*, [1901] A. C., p. 473.

(*t*) *Merchant Shipping Co.* v. *Armitage* (1873), L. R. 9 Q. B. 99 ; *Robinson* v. *Knights* (1873), L. R. 8 C. P. 465 ; *Harrowing S.S. Co.* v. *Thomas* (1915), 19 Com. Cas. 452 ; Carver, 5th ed., sect. 550.

contract of affreightment.(*u*) If no cargo is delivered, then probably no freight is payable,(*x*) but if the original vessel is lost, the shipowner may still earn the freight by making delivery in a substituted vessel or in some other way,(*y*) unless the payment of the freight is made to depend upon the arrival of the original vessel. With regard, therefore, to lump-sum freight payable under the first kind of contracts, although the right to such freight may be affected by accidents to the cargo, it will more usually be affected by accidents to the vessel.

With regard to lump-sum freight payable under the second kind of contracts, that is to say, lump-sum freight payable in respect of the time during which the vessel is on hire, it is not easy to see how under ordinary circumstances the right to such freight can be affected by accidents to the cargo which may be loaded on board the vessel, and in the absence of provision to the contrary, the right to such freight is not under ordinary circumstances affected by accidents which temporarily affect the efficiency of the ship. Most contracts of affreightment, however, which stipulate for freight of this character contain a provision to the effect that, if the efficient working of the vessel is prevented for more than twenty-four hours, the payment of freight is to cease until the vessel again becomes efficient. (*z*) If the effect of such a clause is that the freight ceases automatically to be payable, the assured, who has effected an insurance on this freight, will be entitled to recover for the loss of freight thus caused, provided that the clause was brought into operation by reason of perils covered by the policy.

> *The Alps*, [1893] P. 109; 62 L. J. ADM. 59; 68 L. T. 624; 11 W. R. 527; 7 Asp. M. C. 337,
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> was an action on a policy of insurance in chartered freight of the steamship *Alps* for twelve calendar months. The policy was against the usual risks, including fire.

(*u*) *The Norway* (1865), Br. & Lush, p. 395; 13 L. T. 50; per Lord LINDLEY, in *Williams* v. *Canton Insurance Office, Ltd.*, [1901] A. C., p. 473; *Harrowing S.S. Co.* v. *Thomas*, [1913] 2 K. B., p. 192.

(*x*) *Harrowing S.S. Co.* v. *Thomas*, [1913] 2 K. B., p. 192.

(*y*) *Harrowing S.S. Co.* v. *Thomas* (1915), 19 Com. Cas., p. 452.

(*z*) As to the construction of such clauses, see *Meade, King & Co.* v. *Jacobs & Co.*, [1914] 3 K. B. 156.

FACTS.—A charterparty had been made which provided that freight was to be at the rate of £425 per calendar month, payment to be made in cash at New York monthly in advance, and that "in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service."

On August 8, 1891, the vessel, while taking in cargo, took fire, and thirteen days were occupied in repairs. In respect of this period the sum of £179 was repaid to the charterer by the owners, and this action was brought to recover from the underwriters a proportion of the sum so repaid.

Held that, as the clause in the charterparty had been put into operation through the immediate action of the perils insured against, the plaintiffs were entitled to recover.

The Bedouin, [1894] P. 1; 63 L. J. ADM. 30; 6 R. 693; 69 L. T. 782; 42 W. R. 292; 7 Asp. M. C. 391,

was an action on a policy of insurance "for and during the space of three calendar months commencing August 11, 1889, and ending November 10, 1889, both days inclusive, on freight of the *Bedouin*, chartered and/or as if chartered on board or not on board, one-third diminishing each month." The policy covered the usual perils, including perils of the seas.

FACTS.—A charterparty had been made which provided that freight was to be at the rate of £955 per calendar month, and to be paid monthly in advance, and that "in the event of loss of time by deficiency of men, want of stores, breakdown of engines or machinery, or other cause appertaining to the owners, and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

On August 11, 1889, the *Bedouin* sailed with a general cargo from Liverpool for the West Coast of South America, but owing

to damage to the thrust-shaft caused by perils of the seas, the vessel had to be towed to St. Vincent for repairs. There was a delay of twenty-eight days, during which payment of hire ceased, and this action was brought to recover from the underwriters for this loss of freight.

Held by the Court of Appeal (following and approving the *Alps*) that the plaintiffs could recover.

These decisions are in accordance with opinions expressed in the case of *Inman Steamship Company, Limited* v. *Bischoff*, but in this last-mentioned case it was held by the House of Lords that the shipowner, who was claiming for a loss of freight, could not recover from his underwriters.

Inman Steamship Company, Limited v. *Bischoff* (1882), 7 A. C. 670; 52 L. J. Q. B. 169; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6,

was an action on a policy of insurance on "freight outstanding" for three months, from February 20, 1879, to May 19, 1879.

Facts.—The plaintiffs were the owners of a vessel, the *City of Paris*, which was chartered to the Admiralty for a period of three months certain from the 21st February, 1879. The charterparty provided that freight should be payable monthly in respect of the time during which the vessel was in the service of the Admiralty, but if "it should appear to the Commissioners that any delay had been caused or accrued by breach of orders or neglect of duty, or that the vessel had become incapable from any defect, deficiency, or breach of orders, or from any cause whatsoever to perform efficiently the service contracted for, then and in every such case it should and might be lawful to and for the said Commissioners to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship, as they should adjudge fit and reasonable.

About March 21, 1879, the *City of Paris* struck a rock and

received such injuries as to render her unseaworthy and unfit to carry troops. After some delay the vessel was repaired and returned to England. Freight was paid in respect of the period to March 21, and some allowance was made in respect of the expenses of the homeward voyage, but the Admiralty refused to make any payments of freight for the period subsequent to March 21. The plaintiffs, therefore, brought this action to recover for the loss of freight thus caused.

Held that they could not recover, as on the true construction of the charterparty the freight had been earned, but payment of it had not been received owing to the Commissioners having decided in the exercise of their discretion to retain an equivalent amount by way of mulct.

Manchester Liners v. *British & Foreign Marine Insurance Company*, (1901) 7 Com. Cas. 26; 86 L. T. 148; 9 Asp. M. C. 266,

was an action on a policy of insurance upon chartered or hire money valued at £19,500, in the ship or vessel called the *Manchester Corporation*, for the space of three calendar months from March 8, 1900, to June 7, 1900. "To cover and pay the loss of hire money calculated at £216 per day as per clause attached. The amount to be paid on this policy in the event of loss of time as mentioned in this clause shall be £216 daily, on £19,500."

The clause was as follows: "In the event of loss of time from deficiency or inefficiency of men or stores, collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four hours, or rendering her inefficient for the service, the payment of hire shall then cease from the hour when the detention or inefficiency begins until she be again ready and in a fully efficient state to resume her service."

FACTS.—The plaintiffs had chartered the vessel to the Admiralty under a charterparty similar to the one in the case of *Inman*

S.S. Co. v. *Bischoff*, "for the space of three calendar months certain and thenceforward until the Commissioners should cause notice to be given to the owners of the ship that she is discharged from Her Majesty's service. Freight to be paid during such time as the said ship shall be continued in her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged."

After the vessel had been employed for three months, it was found that there were fractures in three blades of the propeller, and the Commissioners thereupon gave notice that the vessel was discharged from the service as from April 5, 1900. Repairs to the propeller were immediately begun and were completed by April 20th. The present action was brought to recover for the loss of freight from April 5 to April 20.

Held that the plaintiffs could not recover as the loss of hire was not due to perils insured against, but to the exercise by the Admiralty of their unfettered right to discharge the vessel from the service.

Quære.—Whether the result would have been the same if the vessel, instead of being discharged, had been merely put out of pay from April 5 to April 20.

The distinction usually drawn between these cases and the cases of the *Alps* and the *Bedouin* is that in the latter cases the cesser of hire clauses were automatically brought into operation and the losses directly caused by perils insured against, whereas in the former cases the losses were to be attributed not to the perils of the sea, but to the act of volition or election on the part of the Commissioners. From this it has been sought to deduce the principle (*a*) that if between the peril and the loss there intervenes some act of volition or election on the part either of the shipowner or the charterer to which the loss may be said to be more proximately due, the loss is to be attributed not to the peril, but to such act of volition or election. It is, however, by no means certain that this view is correct. "If, in the present case, the other terms of the charterparty being the same, a power had been reserved to the charterers or their agents to

(*a*) *See* Arnould, sect. 785.

determine the contract and their liability to further freight on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable." (*b*) This question has also been discussed in connection with the exercise by the charterer of the option to cancel given by the cancellation clause contained in most charterparties. In the case of *Mercantile Steamship Company, Limited* v. *Tyser*,(*c*) where the vessel was damaged by perils of the seas and delayed, it was held that loss of freight consequent on the cancellation of the charterparty by the charterer ought not to be attributed to the perils insured against but to the exercise by the charterer of his option. It must, however, be noticed that this case was earlier in date than the decision of the House of Lords in *Inman* v. *Bischoff*, and the judge who decided it was a member of the Court of Appeal in *Inman* v. *Bischoff*, whose views were not adopted in the House of Lords. In the American case of *Ruger* v. *Firemen's Fund Insurance Company*,(*d*) where the vessel was damaged by collision, but could have been repaired in time to save the sailing date, it was held that loss of commission consequent on the cancellation of the charterparty could not be recovered, as the proximate cause of the loss was the negligence in not repairing the vessel earlier, but the view was expressed that the assured could have recovered if the charterparty had been cancelled in consequence of the impossibility of completing the repairs before the cancelling date. "Such a limitation (*i.e.* the cancellation clause) is presumptively an agreement by the parties themselves that the purposes of the contract would be frustrated, or might be frustrated, by the vessel's delay in arrival beyond the time named, and if there should be any doubt on the subject, leaving the charterer to determine by the exercise of the option given him." (*e*)

(*b*) Per Lord SELBORNE in *Inman S.S. Co.* v. *Bischoff* (1882), L. R. 7 A. C., p. 676; but *contra* per Lord FITZGERALD, p. 692, and the Court of Appeal, 6 Q. B. D. 648. *See* also *Manchester Liners* v. *British & Foreign Marine Insurance Co.* (1901), 7 Com. Cas., p. 34.

(*c*) (1881), L. R. 7 Q. B. D. 73.

(*d*) (1898), 90 Fed. R. 310.

(*e*) Per BROWN, J., at p. 312.

The Mercantile Steamship Company, Limited v. *Tyser* (1881). 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. C. 6 n.,

was an action on a policy of insurance on chartered freight, "at and from London to New York, while there, and thence to Odessa, *via* Constantinople, against the usual perils and including all risks incident to steam navigation."

FACTS.—The vessel, the *Ganges*, had been chartered for a voyage described as a "voyage from the port of New York to the port of Odessa." The freight was £5500 payable in cash at Hull on the good and proper discharge of the cargo in the aforesaid port of Odessa, and the charterparty contained the following clause: "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty."

The vessel started on the voyage from England on August 7, and if all had gone well would have arrived at New York with four or five days to spare, but owing to some failure of the machinery in the British Channel, had to put back for repairs, which took so long that it was impossible for the vessel to reach New York till long after September 8. The charterers thereupon cancelled the charterparty and the freight was lost.

Held that the assured could not recover, as the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty.

Ruger v. *Firemen's Fund Insurance Company* (1898), 90 Fed. R. 310 (Am.),

was an action on a policy of insurance on "commissions on charter, shipped on board ship *Theodor Fischer*."

FACTS.—The charterparty, which was dated November 17, 1896, provided that if the vessel did not arrive at Newport News, on or about February 15, 1897, the charterer should have the option of cancelling. On December 12, 1896, the vessel was damaged by collision, but no attempt to repair was made for

nearly four months. As the vessel did not arrive by the agreed date, the charterers cancelled.

Held that the assured could not recover, as the loss was not due to a sea peril or to a necessary or natural consequence of a sea peril, but to the negligence of the owners.

Semble.—The assured would have been entitled to recover if the charterparty had been cancelled owing to the fact that the repairs due to the collision could not have been effected in time.

In order to exclude liability for loss of freight sustained under a cancellation clause, or under a clause suspending the payment of hire while a vessel is laid up, clauses are frequently inserted in the policy to the effect that "no claim arising from the cancelling of any charter" shall be allowed, and "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." (*f*) The latter clause will also free the underwriters from liability to pay for loss of freight under a contract of affreightment which has been abandoned owing to delay frustrating the object of the adventure thereby contemplated.

In re an Arbitration between Jamieson & The Newcastle Steamship Freight Insurance Association, [1895] 2 Q. B. 90; 64 L. J. Q. B. 560; 72 L. T. 648; 43 W. R. 530; 1 Com. Cas. 395; 7 Asp. M. C. 593; 14 R. 444.

An award stated by an arbitrator in the form of a special case for the opinion of the Court. The claim was under a time policy on the freight of the *Abrota*, and the policy provided that "no claim arising from the cancelling of any charter nor for loss of time under a time charter" should be allowed.

Facts.—On October 10, 1893, the *Abrota* was chartered to proceed to Kotka and there load a cargo for Honfleur. On October 14 the *Abrota* left St. Petersburg for Kotka, and on the same day

(*f*) The words "or otherwise" appear to mean "or from other perils insured against"; *see Turnbull, Martin & Co.* v. *Hull Underwriters' Association, Ltd.*, [1900] 2 Q. B., p. 404.

stranded and had to be taken to Helsingfors for repairs. The time necessary for repairing the damage was, according to the finding of the arbitrator, so long that the voyage contemplated in the charterparty became in a commercial sense impossible. The charterers, being unwilling to wait for the *Abrota*, refused to load under the charterparty, and forwarded their cargo by another steamer.

Held that the assured could recover as the freight had been lost by a peril of the sea, and the charterparty had not been cancelled within the meaning of the provision in the policy.

Bensaude and Others v. *The Thames and Mersey Marine Insurance Company, Limited*, [1897] A. C. 609; 66 L. J. Q. B. 666; 77 L. T. 282; 46 W. R. 78; 2 Com. Cas. 238; 8 Asp. M. C. 315,

was an action on a time policy of insurance on freight of the *Peninsular* against total or constructive total loss and general average only, warranted "free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

Facts.—On April 5, 1895, the *Peninsular* was chartered to carry Portuguese troops and stores from Lisbon to Lourenço Marques in South Africa, at an agreed freight. On April 15 the vessel sailed, but on the following day the main shaft broke from an admitted peril of the sea. The vessel put back for repairs to Lisbon, where it was found that the delay would be such as to make it impossible for the vessel to convey the troops and stores to Lourenço Marques in the requisite time. The troops and stores were consequently landed and the charterers, as they were admittedly entitled to do under Portuguese law, refused to pay any freight. The *Peninsular* was repaired in about a fortnight, and was able to earn freight on another voyage.

Held that the claim was consequent on loss of time within the meaning of the warranty, and that the underwriters were not liable.

Turnbull, Martin & Company v. *Hull Underwriters Association, Limited*, [1900] 2 Q. B. 402; 82 L. T. 818; 69 L. J. Q. B. 588; 5 Com. Cas. 248; 9 Asp. M. C. 93,

was an action on a policy of insurance upon freight of "frozen meat, chartered or as if chartered, on board or not on board." The policy contained the following clause "chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

FACTS.—The vessel, the *Butcshire*, arrived at Sydney, N.S.W., on October 15, 1898, and discharged the outward cargo. On October 18 a fire occurred on board, which damaged the refrigerating machinery, and as materials for the repair of the refrigerating machinery could not be procured at Sydney, the vessel had to be brought back to England for repairs, and no frozen meat could be carried. In an action to recover the freight thus lost,

Held that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

JUDGMENT.—MATHEW, J.: ". . . The ship was damaged by a peril insured against; her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly, there would have been no loss of freight. The loss, therefore, was consequent on loss of time within the words of the warranty."

Scottish Shire Line, Limited, and Others v. *The London & Provincial Marine & General Insurance Company, Limited*, [1912] 3 K. B. 51; 107 L. T. 46; 81 L. J. K. B. 1066; 17 Com. Cas. 240; 12 Asp. M. C. 253; 56 S. J. 551,

was an action on a policy of insurance for £2000 "upon freight on frozen meat and/or apples and/or refrigerated produce valued at £15,000. Chartered or as if chartered. On board or not on board of the ship or vessel called *Ayrshire*. Risk to commence at once and continue in its entirety until steamer sails from final

loading port on homeward voyage. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date."

FACTS.—A contract had been made for the shipment on board the *Ayrshire* at Hobart of 40,000 cases of apples, but the contract was subject to the *Ayrshire* arriving at Hobart on or about March 20, 1910. Owing to a collision the vessel was greatly damaged and did not arrive at Hobart until three months later, in consequence of which the apples had to be sent by another vessel, and the freight was lost.

Held that the "warranted free" clause did not apply, as the contract was not a special charter and did not contain a cancelling date within the meaning of the provisions of the policy.

With regard to a partial loss of freight, the view has been expressed that while there may be a total loss of part of the freight insured, there cannot be a partial loss of the whole freight.(*g*) "As STEVENS remarks, the word average is very inapplicable to claims for partial losses on freight, which, in fact, can only arise from one cause, viz. a total loss on part of freight. It seems in this country, that a claim in respect of partial loss on freight can only be made good when either, 1st, only part of the full intended cargo out of which the freight was expected to arise was on board, or contracted for at the time of the loss; (*h*) 2nd, when some separable part of the whole cargo (*i.e.* separately valued or insured by the policy (*i*)) goes in bulk to the bottom of the sea, or is otherwise totally destroyed by a peril insured against. In both these cases there is a clear total loss of part, or partial loss, of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated. A third case, it seems, may

(*g*) *See Brocklebank* v. *Sughrue* (1831), 1 Moo. & Rob. 102; Arnould, sect. 878; Crump, Marine Insurance, p. 127.

(*h*) *Forbes* v. *Aspinall* (1811), 13 East. 323; *Forbes* v. *Cowie* (1808), 1 Camp. 520.

(*i*) *Ralli* v. *Janson* (1856), 6 E. & B. 422; *see* also *Robertson* v. *Marjoribanks* (1819), 2 Stark. 573.

arise. If a ship with a full cargo on board, is so damaged that she can only be so far repaired at the port of distress as to take on part of the cargo, and the residue is thereupon necessarily and justifiably sold, it has been intimated (*k*) that there may be a total loss on that part of the freight, which the ship is thus incapacited from earning." (*l*)

On the other hand, in the case of *Rankin* v. *Potter*, BRETT, J., said that "there is a partial loss of freight under a general policy on freight, if there be a general average loss caused by a peril insured against giving rise to a general average contribution; or under certain circumstances if there be a total loss of part of the cargo; or if in case of total loss of the ship the cargo be sent on in a substituted ship; or if in case of total loss of the cargo the ship earns some freight in respect of other goods carried on the voyage insured." (*m*)

It is, however, submitted, that except in the cases enumerated by Arnould, and in the case where, after the loss of the original cargo, some freight is earned by carrying other cargo on the voyage insured, there is not a partial loss of freight. The freight may be subject to salvage or general average charges, but if the freight is earned there is no loss of freight, although the assured may be entitled to recover any money he may be liable to pay as money paid by way of average or salvage.(*n*) The freight may be earned by transhipping the cargo in another vessel, but if the freight is earned, there is no loss of freight, although the assured may be entitled to recover the cost of forwarding the cargo under the suing and labouring clause in the policy.(*o*)

According to the memorandum contained in the ordinary form of Lloyd's policy, freight is warranted "free from average under three pounds per cent., unless general, or the ship be stranded." The meaning of this stipulation does not seem to have been considered in this country, and it is not certain whether for the purpose of estimating the percentage of damage, the aggregate value of the whole

(*k*) Per MAUDE, J., in *Moss* v. *Smith* (1845), 9 C. B., p. 104; *see* also *Mordy* v. *Jones* (1825), 4 B. & C. 394; *Philpott* v. *Swann* (1861), 11 C. B. (N. S.) 270.

(*l*) Arnould, sect. 878.

(*m*) (1873), L. R. 6 H. L., p. 98.

(*n*) *See* per ALDERSON, B., in *Benson* v. *Chapman* (1849), 2 H. L. C., p. 723, *ante*, p. 122.

(*o*) *Kidston* v. *Empire Marine Insurance Co.* (1867), L. R. 2 C. P. 357.

freight at risk should be considered, or the value of the freight upon the different parts of the cargo. In the American case of *Lord* v. *Neptune Insurance Company*,(*p*) where freight was valued at 6000 dollars and the cargo consisted of wheat, flour, hides, palm leaf, barrels of bacon, and kegs of lard, forming several shipments from distinct owners, the Court expressed the view that each portion of the freight was to be considered separately. On the other hand, in the case of *Ogden* v. *The General Mutual Insurance Company*,(*q*) the Court treated the insurance as being upon the whole freight as one integral subject, and this, it is submitted, is the correct view unless the policy contains any provision or indication that each item of freight is to be treated separately.

In adjusting such losses the practice "has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject." (*r*)

Freight may also be subject to losses in general average, and such losses if attributable to perils insured against are recoverable from the underwriter under the ordinary form of policy. Such losses may be due either to general average sacrifices or to the liability to contribute in general average.

If goods are jettisoned for the general safety and the freight payable in respect of them is thereby lost, the freight so lost is a general average loss.(*s*) Thus in the case of the ship *Nathaniel Hooper*,(*t*) where part of a cargo of sugars was jettisoned for the general safety, STORY, J., said: "In respect to the jettison of the cargo, it is clear that it constitutes a case of general average, to be borne by the ship, freight, and cargo ultimately saved; and of course in that contribution the entire freight of the cargo thrown overboard is to be added to the loss as a part of the sacrifice, and is to be allowed

(*p*) (1857), 10 Gray, 109 (Am.).

(*q*) (1853), 2 Duer, 204 (Am.).

(*r*) Phillips, 3rd ed., sect. 1780; cited by Lord ESHER, M.R., in *Stewart* v. *Merchants Marine Insurance Co.* (1885), 16 Q. B. D., p. 628; Arnould, sect. 893; Hopkins on Average, p. 280.

(*s*) Hopkins, p. 18; Lowndes, pp. 106, 337; Arnould, sect. 925; Phillips, sect. 1301; Parsons, vol. 2, p. 309. According to the York Antwerp Rules (xv.): "Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act or when the damage to or loss of cargo is so made good."

(*t*) (1839), 3 Sumner, 542 (Am.).

to the shipowners. This is the settled course in the adjustment of general average." Similarly, if cargo, in respect of which freight would be payable, is sold at a port of distress for the purpose of procuring funds to defray general average expenses,(*u*) or if cargo is destroyed by water used to extinguish a fire.

Pirie & Company v. *Middle Dock Company* (1881), 44 L. T. 426; 4 Asp. M. C. 388.

was an action brought by cargo-owners to recover the balance of the proceeds of the sale of cargo at Batavia, which the defendants, the owners of the vessel *Attila*, claimed by way of set-off to retain as representing the contribution by the cargo in general average for the loss of freight.

FACTS.—The vessel sailed from the Tyne on a voyage to Singapore with a cargo of coals. In the course of the voyage the coal was found to be on fire and for the general safety the captain jettisoned a portion of the cargo and caused a large quantity of water to be poured down the hold. Though water was poured on the coals continuously for three days, smoke continued to rise from the hold, and the vessel therefore put into Batavia, where it was found necessary to discharge and sell the coal. The average adjusters employed by the defendants estimated that the amount to be made good by the cargo in respect of the freight lost by the jettison and the means adopted to extinguish the fire was £339 1*s*. 2*d*., and this sum the defendants deducted from the proceeds of the sale. In an action to recover this sum,

Held that the plaintiffs were liable to contribute to the loss of the freight, and could not recover.

If a vessel be stranded or lost under circumstances which give rise to a claim in general average, and the freight which the vessel would have earned is thereby lost, the freight so lost is regarded as a general average sacrifice. "It may be taken, as a general rule that a claim for freight follows the fate of a claim for the vessel. If the vessel is lost under circumstances which make her loss a case

(*u*) Stevens, p. 20; Carver, sect. 433.

of general average, the freight, which is lost, is an additional sacrifice of the vessel." (*x*) Thus in the case of *The Columbian Insurance Company* v. *Ashby*,(*y*) where a vessel was voluntarily run on shore for the general safety and was wrecked, it was held that the freight thereby lost must be made good in general average. "The only remaining point is, whether freight ought to have been brought into the account, either as a part of the loss, or of the contributory value. The auditors' report, which was adopted by the Court, allowed the freight as a part of the loss, and also of the contributory value. It is perfectly clear that if a part of the loss, the freight ought also to contribute. And it seems to us that as, by the loss of the ship, the freight was totally lost for the voyage, it was properly included in the loss, and as a sacrifice by the shipowner for the common benefit." (*z*)

If, however, the freight is lost in consequence of the voyage being abandoned, and the proximate cause of the abandonment of the voyage is not the general average act, but the peril which gave rise to the general average act, the loss of freight is not to be treated as a general average sacrifice. Thus in the case of *Lee* v. *Grinnell*, (*a*) where a vessel took fire and was scuttled, and the voyage was abandoned in consequence of the damage which the vessel had received by the fire, it was held that the freight was not to be made good, the contributors to general average not being insurers of the freight.

Iredale and Another v. *China Traders Insurance Company*, [1900] 2 Q. B. 515; 69 L. J. Q. B. 783; 83 L. T. 299; 5 Com. Cas. 337; 9 Asp. M. C. 119,

was an action on a policy of insurance on the chartered freight of the *Lodore*, valued at £1650.

FACTS.—The plaintiffs were the owners of the ship *Lodore*, which was chartered to carry a cargo of coals from Cardiff to Esquimault. In the course of the voyage the cargo began to heat, and the

(*x*) Per HOFFMAN, J., in *Nelson* v. *Beaumont* (1856), 5 Duer, p. 322 (Am.). *See* also Parsons, Insurance, vol. 2, p. 310; Phillips, sect. 1302; Carver, sect. 434.

(*y*) (1839), 13 Peters, 331 (Am.).

(*z*) Per STORY, J., at p. 344.

(*a*) (1856), 5 Duer. 400 (Am.); *see* also *Nelson* v. *Beaumont* (1856), 5 Duer. 310.

master decided, for the general safety, to bear up for the river Plate. The vessel reached Buenos Ayres, and there discharged the coals, which were subsequently surveyed and found to be unfit to be reshipped. The vessel abandoned the voyage to Esquimault, and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

The defendants, who had underwritten the policy, contended that the action of the master in deciding for the general safety to make for Buenos Ayres amounted to an abandonment of the voyage, and that the consequent sacrifice of freight was to be made good in general average. They admitted that the chartered freight had been lost by reason of perils insured against, and they admitted their liability to make good this loss to the plaintiffs. But they contended that the plaintiffs as owners of the ship were liable to contribute in general average towards the loss of the freight, and they claimed to have credit given to them for the amount of this contribution, when they paid to the plaintiffs the amount recoverable under the policy.

Held that the master did not make for Buenos Ayres for the purpose of abandoning the voyage, but for the purpose of continuing the voyage after he had got the cargo in order; that the loss of freight was due to the condition of the cargo and not to any general average act, and that there was, therefore, no right to any general average contribution.

The amount to be made good in general average will vary according to the circumstances. Where part of the cargo has been jettisoned but the vessel ultimately completes the voyage, the shipowner's loss is of the whole unpaid freight on those goods, less the costs which he would have incurred if those goods had completed the voyage, that is, the cost of landing and delivering the goods. The expenses of the vessel in completing the voyage have not been avoided, and no part of them should therefore be deducted.(*b*) If, after the jettison of a part of the cargo, the ship is wrecked or condemned at a port of

(*b*) Carver, sect. 436. In the United States until recently the rule was to allow the gross freight lost without deductions. Phillips, sect. 1368; Parsons, Insurance, vol. 2, p. 310; *Chrystal* v. *Flint* (1897), 82 Fed. R. 472. The same rule used to prevail in this country, *see* Hopkins, p. 19; Bayly, p. 131; *Chrystal* v. *Flint*, p. 478. The Average Adjusters' Association of the United States has now

refuge, and the balance of the cargo is forwarded to its destination in another vessel, the costs of forwarding, which would have been incurred but for the jettison, must be deducted from the amount to be allowed in general average in respect of the freight which has been lost. If the costs of transhipment are equal to or exceed the original freight, nothing is allowable in general average, since in such a case the jettison has occasioned no loss of freight.(*c*) Similarly, nothing is allowable if, after the jettison, the vessel and the cargo remaining on board are totally lost.

If, after a jettison, the ship puts into a port of refuge, and there takes in fresh cargo in the space left vacant through the jettison, the new freight thus earned, less the extra expenses incurred in obtaining and earning it, must go in diminution of the shipowner's claim for loss of freight. It would be otherwise if the ship were not full at first, so that the new cargo might equally have been received on board had there been no jettison.(*d*)

With regard to the contributory value of freight payable for the carriage of goods under a charterparty or bill of lading, it is the gross amount of the freight earned minus those expenses of earning it which would have been avoided, if no general average act had taken place and the ship had been lost.(*e*) The contribution is based on the benefit derived from the sacrifice by each interest, and in the case of freight the benefit is not the full amount of the freight earned, but that amount less the costs of earning it. From the freight received must be deducted the cost of discharging the cargo and of collection. It is also the practice to deduct the wages of the crew since the general average act, and port charges incurred subsequently to it, until all the cargo has been discharged.(*f*) The value of provisions and coals, laid in before the general average act and subsequently consumed, is not deducted, as the expense of these has been already incurred. The

adopted a rule to the same effect as the rule of English Adjusters (29): "That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost, the charges which the owner thereof would have incurred to each such freight, but has, in consequence of the sacrifice, not incurred."

(*c*) Lowndes, pp. 339, 340.

(*d*) Lowndes, p. 340; Baily, p. 134; *Barclay* v. *Stirling* (1816), 5 M. & S. 6.

(*e*) Per GORELL BARNES, J., in *The Brigella*, [1893] P., p. 196.

(*f*) Carver, sect. 436; Lowndes, p. 374.

cost of provisions and coals laid in after the general average act and consumed before the end of the voyage, should, it is submitted, be treated as part of the expenses of earning the freight, but there is no settled practice on this point.(*g*)

Where a vessel is chartered for a voyage at one entire freight, and at the time of the general average act is engaged in earning that freight, the entire freight should be taken into account for purposes of general average. No distinction, it would seem, should be drawn whether the vessel is in ballast or has goods on board, (*h*) or whether the voyage described in the charterparty is a single voyage from one port to another port, or is a round voyage out and home. Provided that the chartered voyage is one entire voyage, and that the chartered freight is the only freight to be considered,(*i*) the whole chartered freight which is at risk and which the vessel is earning at the time of the general average act should be taken into account both for the purpose of making and receiving contributions in general average. It has been suggested (*k*) that, in those cases where the chartered voyage is a round voyage or consists of several passages, the freight ought to be divided, and that during each passage such part only ought to be considered as may fairly be presumed to belong to that passage. This view has not, however, been adopted.

Williams v. *The London Assurance Company* (1813), 1 M. & S. 318; 14 R. R. 441,

was an action on a policy of insurance on the ship *Dorsetshire*.

Facts.—The vessel had been chartered to the East India Company for a trading voyage to the East and back, and by the charterparty freight to the extent of £3000 was to be paid to the shipowner at the beginning of the voyage, and the balance was to be paid on the safe arrival of the vessel in London on the homeward voyage. At the commencement of the voyage the vessel was driven ashore, but was got off and, after being repaired,

(*g*) Lowndes, p. 374.

(*h*) Baily, pp. 139, 148; Lowndes, p. 364.

(*i*) As to the position where the chartered freight is not the only freight, *see post*, p. 193.

(*k*) Benecke, Principles of Indemnity, p. 315.

completed the voyage. The question for the opinion of the Court was whether the freight payable under the charterparty was to contribute to the general average.

Held that the freight ought to contribute, as it was one entire and indivisible sum payable for the use of the ship out and home.(*l*)

The Steamship Carisbrook Company v. *The London & Provincial Marine & General Insurance Company*, [1902] 2 K. B. 681; 87 L. T. 418; 71 L. J. K. B. 978; 7 Com. Cas. 235; 50 W. R. 691; 9 Asp. M. C. 332,

was an action on a policy of insurance for £2000, upon the hull and machinery of the steamship *Nestor*.

Facts.—The vessel, which was described in the charterparty as "reported ready to leave Fleetwood in ballast," was chartered to proceed to Savannah, and there, having discharged her cargo, if any, load a cargo of cotton and proceed therewith to Liverpool, the freight to be paid on unloading and right delivery of the cargo. On the voyage to Savannah the vessel, which was in ballast, grounded and in the efforts made to get her off, considerable damage was sustained. The vessel was eventually got off, and after being repaired, loaded her cargo at Savannah and earned the chartered freight. An average adjustment of the repairs of the ship was prepared, but the average adjusters in preparing it omitted to make the chartered freight contribute. The plaintiffs having sued the defendants on the policy for the cost of the repairs, the defendants contended that the average statement was incorrect, and that upon a proper adjustment of the loss, the plaintiffs were liable to make contribution in respect of the freight payable under the charterparty.

(*l*) The Court did not decide as to the amount for which the freight was to contribute, or as to what should have been done had the average been adjusted at the end of the outward voyage. That would ordinarily be the proper place for the adjustment, and, at that place only a prospect of earning the freight had been saved, while the cargo's safety had been definitely realized. To put them on an equality, therefore, the freight should contribute only on the value of the prospect of earning it, and all the costs of completing the voyage ought to be deducted. *See* Carver, sect. 438; per Sprague, J., in the *Brig Mary* (1842), 1 Sprague, p. 21 (Am.).

Held that, as the chartered voyage was one entire voyage, and the only freight was the freight payable on the ultimate arrival of the ship with the cargo on board, the chartered freight was liable to contribute to the general average sacrifice.(*m*)

If the chartered voyage is not one entire voyage, but consists of separate voyages in respect of each of which separate freights are payable, only the freight payable in respect of the voyage which the vessel is making at the time of the general average act should, it would seem, be taken into account.(*n*) "No doubt there are differences of convenience where there is a cargo carried to the intermediate port as distinguished from the case where no cargo is carried to the intermediate port, and if cargo is carried under a charter which entitles the ship to a freight at the intermediate port, one can easily understand why the average adjusters should make a difference and limit the contribution in respect of such an average sacrifice, on what I may call the first part of the voyage, to the freight which was to be earned at the first port where the cargo was to be discharged." (*o*)

If the chartered freight is not the only freight, as for instance in those cases where a vessel has been chartered at one rate of freight, and is used by the charterer to carry goods under bills of lading which reserve a different rate, the practice is to regard only the bill of lading freight, and to disregard the charterparty freight.(*p*) If the bill of lading freight is less than the charterparty freight, it is only this lower rate of freight which is allowed in general average and upon which contribution is to be made.(*q*) Similarly, if the bill of lading freight

(*m*) Cf. also *The Progress* (1810), Edwards Adm. R., p. 223; *The Dorothy Foster* (1805), 6 Rob. 88; *The Brig Mary* (1842), 1 Sprague 17 (Am.); *The Kaffir Prince* (1915), 31 T. L. R. 296.

(*n*) *See* Carver, sect. 439; *The Progress* (1810), 1 Edw. Adm., p. 224; but *see* Parsons on Shipping, vol. 1, p. 452. In an American case, where a vessel was chartered under a time charter for three successive voyages, and the freight was payable monthly, it was held that the value of the freight for purposes of contributing to general average incurred on the last voyage, should be based on the current rate of freight for that voyage. *Spafford* v. *Dodge* (1817), 14 Mass. R., p. 80 (Am.).

(*o*) Per COLLINS, M.R., in *Steamship Carisbrook Co.* v. *London & Provincial Insurance Co.*, [1902] 2 K. B., p. 690.

(*p*) Carver, sect. 435; Lowndes, p. 341; M'Arthur, 2nd ed., p. 203; Baily, p. 131; per GORELL BARNES, J., in *The Leitrim*, [1902] P., p. 267.

(*q*) Baily, p. 132; Lowndes, p. 341; M'Arthur, p. 203.

is greater than the charterparty freight, it is only the bill of lading freight which is considered, but as it would be unfair that the shipowner should contribute or be paid on the higher rate of freight, the charterer is liable to contribute on the excess between the charterparty and the bill of lading rate of freight, (*r*) and is entitled to any allowance made in respect of the excess. "When a vessel is under charter, and the freight under the charter is less than that under the bill of lading, the loss allowable in general average is the freight under the bill of lading; and as in such a case it is easy to divide that allowance between the shipowner and the charterer, giving to each the part of it which respectively belongs to each of them, it is usual to do so—not as a recognition in a general average to which cargo contributes, of the freight under the charter, but for practical convenience." (*s*)

The Leitrim, [1902] P. 256; 71 L. J. P. 108; 87 L. T. 240; 51 W. R. 158; 8 Com. Cas. 6; 9 Asp. M. C. 317.

was an action on a policy of insurance on the ship *Leitrim*, to recover the sum of £66 18*s*. 6*d*.

Facts.—The plaintiffs, the owners of the *Leitrim*, had chartered the vessel for a period of five months under a time charter which provided that hire was to cease in the event of damage preventing the working of the vessel for more than twenty-four hours. The charterers sub-chartered the vessel for a voyage from Barry to Cape Town with a cargo of coals at a freight of 35*s*. per ton delivered. While the vessel was loading at Barry a fire broke out and to extinguish the fire it was found necessary to pour large quantities of water into the holds. After the fire was extinguished, the vessel was repaired, but under the time charter the vessel was off hire for thirty-nine days, the greater portion of which time was due to repairs consequent on damage caused by the water which had been pumped into the vessel.

A statement of general and particular average was prepared, to which the plaintiffs objected on the ground that it did not make any allowance in respect of loss of hire, which they contended should be made good in general average.

(*r*) Hopkins on Average, p. 108; M'Arthur, p. 203.
(*s*) Baily, p. 131; Lowndes, p. 366, note (*b*); Carver, sect. 435.

Held that the loss of hire was not to be made good in general average, (1) on the ground that in general average claims for delay are not taken into account, (2) on the ground that the time chartered freight was not a matter with which the owners of the cargo were concerned, and should be disregarded.

If the charterparty provides for the carriage of goods on a homeward voyage and contemplates that the shipowner will on the outward voyage be carrying goods for other persons, in the event of a general average act during the outward voyage, it is only the freight payable in respect of the outward cargo which should be taken into account. It has been suggested (*t*) that a distinction should be drawn between those cases where the charterparty was made before the contract for the carriage of the outward cargo, and those cases where the charterparty was made after the contract for the carriage of the outward cargo. But in practice no such distinction is drawn, and the Rules of Practice of the Association of Average Adjusters provide "that when at the time of a general average act the vessel has on board cargo shipped under charterparty or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average." (*u*)

If the vessel has been chartered under distinct charterparties for other voyages after the one which she is making, the correct principle, it is submitted, is to take into account only the freight payable in respect of the voyage which the vessel is making at the time of the general average act.(*x*) In the case of *Rankin* v. *Potter*,

(*t*) Rule 34.

(*u*) The case of *Moran* v. *Jones* (1857), 7 E. & B. 523, apparently conflicts with this view. In this case a vessel had been chartered to proceed in ballast from Liverpool to the Chincha Islands, and there load a cargo of guano for carriage to the United Kingdom at a freight of £4 10*s*. per ton. With the consent of the charterers the plaintiffs shipped on freight from other parties a small quantity of goods, the value of the goods being about £600. General average expenses were incurred on the outward voyage to which the underwriters on the chartered freight were willing to contribute, and the Court expressed the view that they were liable to do so. It should, however, be noticed that the object of the voyage was to earn the chartered freight, and the freight payable for the outward cargo was so insignificant that no attention seems to have been paid to it. *See* also the case of the *Brig Mary* (1842), 1 Sprague, 17 (Am.).

(*x*) It has been seen (*ante*, p. 193) that if the chartered voyage is not one entire voyage, but consists of separate voyages in respect of which separate

a charterparty had been made under which a vessel was to proceed to New Zealand with cargo for owners' benefit and having discharged that cargo was to proceed to Calcutta and there load a cargo from the charterers for carriage to London, and the view was expressed by WILLES, J.,(*y*) and BLACKBURN, J.,(*z*) that as the chartered freight was not to be earned during the voyage to New Zealand, it was not liable to contribute to general average incurred during that voyage. In the case of the *Dorothy Foster*,(*a*) Lord STOWELL said: "As to the second question, whether a salvage is due on the freight, that will depend on another question of fact, whether the freight was in a course of being earned, because I cannot go the length of holding that it would be sufficient that the ship was *enabled* to earn freight by the act of recapture. If a vessel had been cut out of port, and had been afterwards recaptured, it could not be contended, I conceive, that salvage would be due on the freight accruing on the *following* voyage."

Where freight payable for the carriage of goods has been paid in advance or is unconditionally payable at a certain time whether the goods arrive or not, the obligation to make and the right to receive general average contribution in respect of such freight is transferred from the owner of the ship to the owner of the goods. The rights and obligations of the shipowner in respect of such freight cease, because in such cases the freight is no longer at his risk. The owner of the cargo has purchased the right to have it carried to its destination, and the advantage derivable from the performance of the voyage is thenceforward his concern.(*b*) In the case of *Frayes* v. *Worms*,(*c*)

freights are payable, only the freight payable in respect of the voyage which the vessel is making at the time of the general average act should, it would seem, be taken into account.

(*y*) (1868), L. R. 3 C. P., p. 567.

(*z*) (1873), L. R. 6 H. L., p. 115.

(*a*) (1805), 6 Rob. 88. This was a salvage case, but there is a close analogy between questions of salvage claims and questions of general average loss. *See* per COLLINS, M.R., in *S.S. Carisbrook Co.* v. *London & Provincial Insurance Co.*, [1902] 2 K. B., p. 689; per Lord ELLENBOROUGH in *Cox* v. *May* (1815), 4 M. & S., p. 159.

(*b*) Lowndes, p. 355; M'Arthur, p. 202; Arnould, sect. 986; Carver, sect. 440.

(*c*) (1865), 19 C. B. (N. S.) 159; S. C. reported as *Frayes* v. *Worms*, 34 L. J. C. P. 274.

the question arose whether the charterer was liable to contribute to general average expenses incurred on the voyage, in respect of freight paid in advance upon a cargo of coals shipped by him for San Francisco and delivered to him there, and it was held that he was liable to contribute. The question whether this contribution was in respect of an interest in freight, or of an interest in cargo, was not decided, but the latter seems the more correct view. It must be remembered that for purposes of general average the value of the cargo under ordinary circumstances is its market value at the date of delivery or at the time and place which form the basis of adjustment, less those expenses which the owner of the cargo must incur in the event of delivery and will avoid in the event of total loss; that is, the discount, freight, landing and warehousing charges, duty and brokerage.(*d*) But if freight has been paid in advance, the cargo-owner will, so far as freight is concerned, incur no further expense in the event of the safe arrival of the cargo and will save nothing in the event of its loss, and in arriving at the value of the cargo in such cases nothing should be deducted in respect of freight. Prepaid freight in such cases should not be regarded as a separate interest, but as forming part of the value of the goods.(*e*) "When the freight under the bills of lading has been paid, lost or not lost, on the shipment of the cargo, freight is merged in the cargo, and does not contribute under that name." (*f*)

Where the freight paid in advance is chartered freight payable for the use of a vessel irrespective of the cargo which may be put on board, such freight must, it would seem, be treated as a separate interest, and contributions in respect of such freight will be made and received by the party who has paid the freight, that is, by the charterer.

Where expenses of reloading are incurred at a port of refuge in consequence of accidental damage to the vessel, the practice is to charge these expenses against the freight whether prepaid or not, although these expenses should properly be chargeable to the ship-owner who is under the duty of completing the voyage and carrying the cargo to its destination. This practice has been the subject of much adverse criticism,(*g*) and was treated by Lord Blackburn

(*d*) Lowndes, p. 353.

(*e*) *Ibid.*, p. 355; Carver, sect. 440; but *see* Arnould, sect. 986.

(*f*) Bayly, p. 158.

(*g*) Lowndes, p. 261; Carver, sect. 410, App. D., pp. 989, 990; Bayly, p. 162.

in the case of *Svendsen* v. *Wallace* (*h*) as being wrong, but it is confirmed by a rule of the Association of Average Adjusters. "The expenses referred to in clause (*d*)" (viz. the cost of reloading the cargo and the outward port charges) "are charged to the party who runs the risk of freight—that is, wholly to the charterer—if the whole freight has been prepaid, and, if part only, then in the proportion which the part prepaid bears to the whole freight."

Most of the rules, to which reference has been made, have been the subject of adverse criticism. Thus the rule that, where there is a charterparty and goods have been shipped under bills of lading which reserve a lower rate of freight, it is only the bill of lading freight which should be taken into account, has been criticised by the late Judge CARVER (*i*) on the ground that, to the extent to which the chartered freight exceeds the bill of lading freight, the shipowner has a distinct interest which should contribute and be contributed to in general average. The late Mr. Lowndes, on the other hand, supported the rule on the ground that in such cases the owner of the goods shipped under the bills of lading has no concern with the charterparty.(*k*) Again, the rule that, where a ship has been chartered at independent freights for other voyages after the one upon which she is proceeding, such ulterior freights should not be taken into account, was not accepted by Judge Carver or Mr. Lowndes. They were of opinion that such freight should be taken into account if they had a peculiar value for the shipowner, on the ground that to that extent the value of the ship to the owner was enhanced. (*l*)

It is, however, submitted that the rules, which have been set out above, are on the whole correct in principle for this reason, that the elements to be considered in questions of general average are not the interests of the owners of the cargo or of the owners of the ship, but the cargo, the ship, and the freight which the ship is earning

(*h*) (1885), L. R. 10 A. C., p. 416.

(*i*) Carver, Carriage by Sea, sect. 435.

(*k*) Lowndes, p. 341; *see* also per GORELL BARNES, J., in the *Leitrim*, [1902] P., p. 267; Bayly, p. 132. Mr. Lowndes, it would seem, also supported the rule on the ground that in such cases the charterparty should be treated as a speculative contract and ignored, although in other parts of his work he expressed the view that any freight which could be insured should be taken into account for purposes of general average, pp. 361, 366.

(*l*) Lowndes, p. 368; Carver, sect. 439.

at the time of the disaster. That this is so in the case of the cargo is undisputed, as the existence of a profitable contract for the sale of the cargo is ignored. The fact that the owner of the cargo may have an interest in the cargo beyond its ordinary value is disregarded, and by parity of reasoning the fact that the owner of the ship has an interest in the ship beyond its ordinary value should also be disregarded. If this view is correct, contracts for the future employment of a ship, which do not affect the intrinsic value of the ship,(*m*) must be ignored, and this view is supported by the language of Lord STOWELL in the case of the *Dorothy Foster*: (*n*) "As to the second question, whether a salvage is due on the freight, that will depend on another question of fact, whether the freight was in a course of being earned, because I cannot go the length of holding that it would be sufficient that the ship was *enabled* to earn freight by the act of recapture. If a vessel had been cut out of port, and had been afterwards recaptured, it could not be contended, I conceive, that salvage would be due on the freight accruing on the *following* voyage."

The freight which is to be taken into account is the freight which the vessel is engaged in earning at the time of the general average act, and not the interests in freight which may be benefited by the continued existence of the vessel. The rules for ascertaining the freight to be considered for purposes of general average are very similar to the rules for ascertaining the freight covered by an ordinary policy. Thus where a vessel has been chartered for a round voyage at one entire freight, and the vessel is sailing on this voyage, either in ballast or with cargo belonging to the charterer, the entire chartered freight is covered by the ordinary policy (*o*) and contributes in general average. If the charterparty provides for two distinct voyages in respect of which two distinct freights are payable, it is only the freight for the immediate voyage which the vessel is making which is covered by the ordinary policy, and which is considered for purposes of general average. And similarly, if the vessel has been chartered for successive voyages under separate contracts of affreightment.

(*m*) *See* per BRETT, M.R., in *Sea Insurance Co.* v. *Hadden* (1884), L. R. 13 Q. B. D., p. 713. "The existence of a contract of affreightment does not add to the value of the ship. It is no part of it."

(*n*) (1805), 6 Rob., p. 90.

(*o*) *See ante*, p. 24.

CHAPTER VI.

Adjustment. Valuation. Abandonment. Subrogation.

According to the Marine Insurance Act, "subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: in insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance." (*a*) This rule is in accordance with old-established practice, which was recognised in the case of—

Palmer and Others v. *Blackburn* (1822), 1 Bing. 61; 1 L. J. (o. s.) C. P. 1; 7 Moore, 339; 25 R. R. 599.

This was an action on an open policy of insurance on the freight of the ship *Juliana*.

Facts.—The vessel, which was bound from the East Indies to London, was totally lost just before the termination of the voyage. The freight payable to the plaintiffs in the event of the safe arrival of the vessel would have been £3068; but out of this the plaintiffs must have paid £700 for seamen's wages, pilotage and dues, etc., from which payment they were altogether exempted by the loss of the vessel. The defendant contended that they were not entitled to recover more than the amount of the net freight, after deducting the charges which the plaintiffs must have incurred if the ship had arrived in safety. The plaintiffs claimed the amount of the gross freight, and called evidence to prove that although open policies on freight were extremely rare, the uniform custom in settling losses upon them had been to pay the assured on the amount of the gross freight.

(*a*) Sect. 16 (2).

The jury found a verdict for the plaintiffs for the whole amount, and the defendant moved for a rule to show cause why the verdict should not be set aside on the ground that evidence of the usage ought to have been excluded as it was contrary to law, a policy of insurance being a contract of indemnity, whereas the usage would secure to the shipowner a profit in the event of the loss of the ship.

Held that the evidence was rightly admitted and the rule was refused. (*b*)

The subject-matter of the insurance is the freight which the assured may have at risk, and not the profit which he may derive out of that freight, and therefore no account should be taken of the costs and expenses which have to be incurred in order to earn the freight. The underwriter, as it has frequently been said, insures that the freight shall be earned, but he does not insure that the freight when earned shall yield a profit to the assured. (*c*) He has nothing to do with questions of profit or loss. He cannot rely on the fact that the shipowner has by the loss been saved the ordinary expenses of the voyage, and he is not under ordinary circumstances responsible for any extraordinary loss or expenses due to the prolongation of the voyage. (*d*)

In the event, therefore, of a total loss of all the freight covered and intended to be covered by the policy, the assured, in the absence of any provision to the contrary, (*e*) will be entitled to recover the full amount insured, provided that this does not exceed the gross amount of the freight at risk under the policy plus the charges of insurance, and he will also be entitled to recover in a proper case under the

(*b*) *See* also *Stevens* v. *Columbia Insurance Co.* (1805), 3 Caines, 43 (Am.); *United States Shipping Co.* v. *Empress Assurance Corporation*, *ante*, p. 51; [1907] 1 K. B. 259; *Thames & Mersey Insurance Co.* v. *Gunford Ship Co., Ltd.*, [1911] A. C., p. 549; Phillips, 3rd ed., sect. 1238.

(*c*) Cf. per POLLOCK, C.B., in *Benson* v. *Chapman* (1847), 5 C. B., p. 345; *Jordan* v. *Warren Insurance Co.* (1840), 1 Story, p. 352 (Am.); *Ogden* v. *General Mutual Insurance Co.* (1853), 2 Duer. 204 (Am.); *Allen* v. *Mercantile Mutual Insurance Co.* (1871), 44 N. Y., p. 441 (Am.).

(*d*) *Insurance Co. of North America* v. *Jones* (1807), 2 Binn. 547 (Am.); *Mayo* v. *Maine Insurance Co.* (1808), 4 Mass. R. 374 (Am.).

(*e*) According to Weskett, art. "Freight," the London Assurance Company used to refuse to make insurance on freight, unless it was specified to be on *net* freight.

sue and labour clause any expenses reasonably incurred in endeavouring to avert the loss. (*f*)

It may be, however, that at the time of the loss only a portion of the cargo, which it was contemplated would be loaded and in respect of which freight would be payable, has been put on board, or it may be that at the time of the loss a portion of the cargo, which has been loaded, has been safely landed and the freight payable in respect of it withdrawn from the risk. How in such cases is the loss to be adjusted? It has been said that in an open policy on freight, where only part of the intended cargo is on board or contracted for at the time of the loss, the underwriter is only liable for the same proportion of the sum insured as the freight of the goods lost bears to the full freight, which would have been earned, had the whole intended cargo been loaded and all arrived. "If in an open policy on freight, only part of the cargo be on board or contracted for at the time of the loss and this part be totally lost, the underwriter can only be called upon to pay the actual amount of freight on the goods actually lost, together with premiums and costs of insurance; in fact, in such cases the underwriters, whether in a valued or open policy, shall adjust as for a total loss of part of the freight: paying the same proportion of the sums for which they have subscribed the policy as the freight of the goods lost bears to the full freight which would have been earned had the whole intended cargo been loaded and all arrived." (*g*)

This will be the correct rule to be applied in those cases where the policy was intended to cover the freight of any particular cargo, but in the case of an open policy it will seldom happen that the policy was intended to apply to any particular cargo. It may be contemplated that a full cargo will be loaded, but the intention is generally to cover the freight which the assured may have at risk, whatever that may prove to be. The correct rule, therefore, for adjusting losses under an open policy on freight is, it is submitted, under ordinary circumstances to ascertain the proportion which the freight lost bears to the whole freight which has been at risk under the policy. "Subject to any express provision in the policy, where there is a

(*f*) *Kidston* v. *Empire Marine Insurance Co.* (1867), L. R. 2 C. P. 357; *Lee* v *Southern Insurance Co.* (1870), L. R. 5 C. P. 397.

(*g*) Arnould, sect. 1041.

partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy." (*h*) The proper time to ascertain the freight which has been at risk under the policy is at the expiration of the risk. "The underwriter insures against accidents happening during the voyage, and the whole voyage must be regarded before it can be ascertained whether and to what extent the assured are damnified." (*i*) In adjusting a loss, therefore, under an open policy on freight, it is not under ordinary circumstances the freight which the assured had at risk at the time of the loss, or the freight which it was contemplated would be at risk, which must be taken into account, but the freight which the assured actually has had at risk during the voyage.

Where a part of the freight which has been at risk and covered by the policy has been earned before the loss occurs, it has been suggested that the loss should be adjusted by comparing the value of the freight lost with the value of the freight at risk at the time of the loss. "The amount for which the underwriters are liable, in a partial loss of freight, is computed similarly to a partial loss on the ship. If a part of the original cargo is discharged in the course of the voyage, or lost by inevitable accident, the amount of this interest at risk is thereafter less. Where the sum insured, whether in a valued or open policy, is less than the value of the interest at risk when a partial loss happens, the underwriter pays the same proportional part of the loss that the sum insured is of the value of the interest *then* at risk, but if the sum insured is equal to the value at risk, he pays the whole of the loss." (*k*)

It is submitted that this view is not correct and that the rule which has been set out above, viz. that in adjusting losses under an open policy on freight, it is necessary to compare the value of the freight lost with the value of the whole freight which has been at risk under

(*h*) Marine Insurance Act, sect. 70. This section must be read in conjunction with sect. 75 (2).

(*i*) Per MONTAGUE SMITH, J., in *Lidgett* v. *Secretan* (1871), L. R. 6 C. P., p. 630; *see* also per MAULE, J., in *Stewart* v. *Steele* (1842), 5 Scott, N. R., p. 949.

(*k*) Phillips, sect. 1454.

the policy, applies also in those cases where, before the loss, part of the freight which has been at risk under the policy has been earned and withdrawn from the risk. To take an illustration. A policy for £1000 is effected on freight at and from port A to port B, and at port A a full cargo is loaded, the freight of which will be £5000. The vessel arrives at port B, and after unloading half the cargo in respect of which £2500 is paid, is wrecked and the remaining moiety of the freight is lost. In this case there has only been a loss of a moiety of the freight which has been at risk under the policy, and the assured can only recover a moiety of the sum insured, or to put it in another way, the assured can only recover such proportion of the loss as the sum insured bears to the value of the whole freight which has been at risk under the policy, and not that proportion of the loss which the sum insured bears to the value of the freight at risk at the time of the loss.

In the case of valued policies the principles to be applied in adjusting losses are the same as in the case of open policies. "With regard to the real point to be decided, the fact that this is a valued policy, is, in my mind, a mere accident, and does not affect the question. The question whether there was a total or a partial loss, is in this case, as I think it ought in every case to be, quite independent of whether the policy was valued or not. The question is, what is the subject-matter that is covered by the insurance, and whether the whole of the subject-matter is lost, in which case it would be a total loss; or whether only a part of it is lost, in which case it would be a partial loss only, the amount of which would depend upon the proportion which the part that was lost bore to the whole subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved; if it be an open policy, you must prove the value of the whole subject-matter. When that is proved, it comes to the same result; the fact of the policy being valued merely dispenses with proof of value." (*l*)

Although the principles in the case of valued and open policies are the same, certain complications arise from the fact that the policy contains a valuation. A valued policy is a policy which specifies the agreed value of the subject-matter insured. (*m*) The value fixed

(*l*) Per BLACKBURN, J., in *Tobin* v. *Harford* (1864), 17 C. B. (N. S.), p. 536.
(*m*) Marine Insurance Act, sect. 27 (2).

by the policy is conclusive of the insurable value of the subject intended to be insured, (*n*) but this leaves open the question, what is the subject intended to be insured. It has been laid down that "a valuation of freight refers *primâ facie* to the freight of a full cargo, or the charter of the entire ship," and in the case of *Denoon* v. *The Home and Colonial Assurance Company* (*o*) it was held that the policy must be so construed in the absence of something to show the underwriter that the valuation was of less than such full freight. It may, however, be doubted whether this presumption applies in all cases. In those cases where it is expected that the vessel will load a full cargo, and the vessel is lost before the loading is completed, and before it can be determined whether a full cargo will ultimately be loaded or not, the presumption that the valuation refers to the freight of a full cargo may be necessary. This was the view adopted in the cases of *Forbes* v. *Aspinall* and *Patrick* v. *Eames*.

Forbes and Another v. *Aspinall* (1811), 13 East. 323; 12 R. R. 352,

was an action on a policy of insurance on freight valued at £6500, upon the ship *Chiswick*, at and from any port or ports in Hayti to Liverpool.

Facts.—The vessel arrived at Hayti with a cargo of goods to be bartered, and had bartered a portion of the goods for 55 bales of cotton when the vessel was driven on shore and lost. The remaining portion of the outward cargo was saved from the wreck and was exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of greater value than the sum insured on freight.

The defendant settled for the freight of the 55 bales of cotton, but contended that he was not liable for any further amount. The plaintiffs, on the other hand, claimed the full amount of the valuation.

Held that the plaintiffs could not recover as the valuation looked to freight upon all the goods which the ship was intended to carry upon the voyage insured, viz. a complete cargo, and as the

(*n*) Marine Insurance Act, sect. 27 (3).

(*o*) (1872), L. R. 7 C. P. 341.

freight of only a portion of such cargo had been lost, the plaintiffs could only recover in respect of the freight so lost.

Patrick v. *Eames* (1813), 3 Camp. 441,

was an action on a policy of insurance on the freight of the ship *Jane*, valued at £4000, at and from the ship's port of loading to Liverpool.

FACTS.—The vessel was sent by her owners to St. Nicholas with the idea of loading a full cargo of orchella weed, but after taking in 150 bags the vessel was totally wrecked. At the time of the loss no more orchella weed was ready or contracted for, but there were persons in St. Nicholas employed in picking and preparing what would have been a sufficient quantity to fill the ship.

The defendant paid into Court a sufficient sum to cover the freight of the 150 bags of orchella weed on board at the time when the vessel was wrecked, and a return of the premium for short interest, but the plaintiffs claimed the full amount of the valuation.

Held that the plaintiffs were not entitled to recover any further amount.

If, however, the vessel cannot obtain a full cargo, and sails with all the cargo which she can obtain, then, unless it appears that the subject insured was in fact intended to be the freight of a full cargo, the valuation should, it is submitted, be applied to the freight of the cargo so obtained. "It does not appear that, when this policy was subscribed, the plaintiffs knew the quantity of goods which the ship was to take on board at Amsterdam; or the price, which was to be paid for their transportation to Philadelphia. In this state of uncertainty, the parties agree that it shall be valued at a sum, which eventually proves to be three times the value of the carriage of the goods. But we do not perceive that the estimate was unfairly made. It is not found that the ship did not take all the cargo which could have been procured at Amsterdam." (*p*)

(*p*) Per PUTNAM, J., in *Coolidge* v. *Gloucester Marine Insurance Co.* (1819), 15 Mass. R., p. 344 (Am.); *see* also *Wolcutt* v. *Eagle Insurance Co.* (1827), 4 Pick., p. 436 (Am.); *Boardman* v. *Boston Marine Insurance Co.* (1888), 146 Mass. R., p. 453 (Am.).

In America it has been held that in the case of a valued time policy on freight, the valuation should be construed as applying to that freight only which the assured may have at risk.

New York and Cuba Mail Steamship Company v. *Royal Exchange Assurance* (1907), 154 Fed. R. 315.

was an action on a policy of insurance for the period of 12 months on freight of the *Vigilancia*, on board or not on board, valued at £2062.

FACTS.—While on a voyage from Vera Cruz to New York, *via* Havana, the *Vigilancia* stranded and a large portion of the cargo was lost. When the vessel left Vera Cruz for New York the freight amounted to about 6888 dollars, and of this some 3467 was payable in advance and the balance, 3421 dollars, was payable in New York, but of this only 38 dollars was earned. Cargo had been engaged at Havana by the plaintiff company for carriage by its line to New York, and this cargo the plaintiff company proposed to ship by the *Vigilancia*, but owing to the accident it had to be sent on by another vessel. With regard to this freight, which would have amounted to about 3000 dollars, the Court held that as it had not been definitely appropriated to the *Vigilancia*, it was not at risk under the policy.

Held that the assured could recover the full amount of the valuation as the policy covered only the freight which the assured had at risk, viz. the freight payable at New York, and the valuation must be construed as applying to this freight. (*q*)

If, however, it appears that the subject-matter, to which the valuation was intended to apply, was the freight of a full cargo, the valuation must be so applied. In fact, in every case in which it appears that the valuation was intended to refer to any particular subject-matter, it should be so construed.

(*q*) *See* also *Delano* v. *American Insurance Co.* (1864), 42 Barb. 142 (Am.).

Allison v. *Bristol Marine Insurance Company* (1876), L. R. 1 A. C. 209; 34 L. T. 800; 24 W. R. 1039; 3 Asp. M. C. 178,

was an action on two policies of insurance on the freight of the *Merchant Prince*. One of the policies was for £500 on "freight valued at £2000"; the other was for £700 on "freight payable abroad valued at £2000."

FACTS.—The vessel was chartered to carry a full cargo of coals from Greenock to Bombay, and by the charterparty half of the freight was payable in advance. The other half was payable on delivery at Bombay, and the total amount of freight was estimated at £4573. There was no evidence that the terms of the charterparty had been communicated to the defendants, but the plaintiff intended the policies to cover only the moiety of the freight payable at Bombay.

Held that the subject-matter intended to be insured by the policy was the freight which the assured had at risk, viz. the freight payable at Bombay, and that the assured was entitled to recover the full amount of the valuation. (*r*

Williams v. *The North China Insurance Company* (1876), L. R. 1 C. P. D. 757; 35 L. T. 884; 3 Asp. M. C. 342,

was an action on a policy of insurance on "estimated amount of freight valued at 69,807 guilders," *i.e.* £5941, the freight of the ship *Queen of the Colonies*, on a voyage from Java to a port in the United Kingdom or Continent.

Held that the Court might inquire what was intended to be included in the valuation, viz. the whole of the freight, or the freight less certain sums which had been paid in advance.

JUDGMENT.—Per JESSEL, M.R.: "The next question is, what did they insure? We have been much pressed by the rule that in the case of a valued policy you cannot open the valuation. This only means, however, that you must take the value of the thing

(*r*) This was decided by the Court of Common Pleas, 29 L. T. 38; *see* also per BRETT, J., and Lord HATHERLEY, in the House of Lords, L. R. 1 A. C., pp. 216, 238.

insured as proved; it does not settle the question what the thing insured is. The question here is, what was insured under the words 'estimated freight?' Was it meant that the total freight, including advances, should be insured, or only so much of the freight as remained unpaid, or due, or to become due to the shipowners? It is really a question of fact. The words of the policy may mean either. They may cover the portion of freight paid in advance or not. To ascertain whether they do we must look at the evidence. Now it is clear from the evidence that the total amount of freight, including advances, was intended to be insured." (*s*)

A valuation refers to the subject intended to be insured, (*t*) and not to the interest of the assured in that subject. There are, however, in this country dicta to the effect that the valuation refers to the assured's interest, (*u*) and this view seems to have been adopted in the case of—

Feise and Another v. *Aguilar* (1811), 3 Taunt. 506; 12 R. R. 695.

This was an action on a policy of insurance upon goods valued at £19,000.

(*s*) The case of *Denoon* v. *Home & Colonial Assurance Co.* (1872), L. R. 7 C. P. 341, is opposed to these two cases. In Denoon's case the assured effected an insurance for £1000 on freight valued at £2000. He had previously arranged to load his vessel with coolies, in respect of whom passage-money would be payable, and with rice, in respect of which freight would be payable. The policy was intended by the assured to cover the freight of the rice, which was the only freight at risk, but it was held that as this intention had not been communicated to the underwriters it must be disregarded, and that the valuation should be construed as having been intended to apply to the freight of a full cargo.

The person whose intention has generally to be considered is the assured, as the underwriter under ordinary circumstances has no intention other than that to be inferred from the fact that he has made an insurance in general terms, and he must be taken to have intended to insure all the freight which the assured in fact has or expects to have at risk. *See Allison* v. *Bristol Marine Insurance Co.* (1873), 21 W. R., p. 735.

(*t*) Marine Insurance Act, sect. 27.

(*u*) "The effect of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute, but in order to avoid disputes as to the quantum of the assured's interest the parties agree that it shall be estimated at a certain value." Per LAWRENCE, J., in *Shawe* v. *Felton*, 2 East., p. 116; per PATTESON, J., in *Irving* v. *Manning* (1846), 1 H. L. Cas., p. 305; Arnould, sect. 355.

FACTS.—Several persons had contributed to provide this cargo, respectively becoming partners with the plaintiffs in various assortments of goods which those persons chose. The plaintiffs were interested in the proportion of four parts in nine of the whole, and the other persons, some of whom were alien enemies, were interested in the other five parts.

Held that the value insured must be taken to be the value of the plaintiffs' interest, and that they were entitled to recover the full amount of the valuation.

In America, on the other hand, the view is that the valuation under ordinary circumstances refers to the value of the whole subject insured, and not to the interest of the assured in that subject. "Had the policy been valued, as the insurance was on the cargo generally, the valuation could only have been applied to the whole subject insured, not to an undivided interest. Such an interest to be the object of a valuation must be specifically described, or at least, it must be declared in terms that it is only the interest of the party that is meant to be valued. If A.B. insures 10,000 dollars on a ship valued at 10,000 dollars, if it appeared on the trial that he was only the owner of one-fourth, 2500 dollars and not 10,000 dollars is the sum he would recover." (*x*) Thus in the case of *Dumas* v. *Jones*,(*y*) where the policy was for 5000 dollars on freight valued at the sum insured, and the assured was only interested as part owner to the extent of one half, it was held that he could not recover more than a moiety of the sum insured, and in the case of *Murray* v. *Columbian Insurance Company*, (*z*) where a ship was valued at 16,000 dollars, it was held that the assured, who owned only a moiety of the ship, could only recover according to the quantum of the interest proved. On the other hand, in the case of *Post* v. *Phœnix Insurance Company*,(*a*) where the policy was on one-fourth of the vessel valued at 5500

(*x*) Duer, Marine Insurance, vol. 2, p. 79.

(*y*) (1808), 4 Mass. R. 649 (Am.).

(*z*) (1814), 11 Johns R. 302. "When a policy is a valued one, and the assured on the trial shows an interest only in a part of the subject insured, as, for example, an eighth, a fourth or a half, he will recover an eighth, a fourth, or a half of the valuation in the policy, and a greater or smaller proportion of such valuation, according to the quantum of interest proved," per VAN NESS, J., at p. 313.

(*a*) (1813), 10 Johns R. 79 (Am.).

dollars, and one-fourth of the cargo valued at 10,000 dollars, it was held that the valuation applied to the interests of the assured and not to the whole ship and cargo.

The view which has been adopted in America is, it is submitted, correct, and is in accordance with the provisions of the Marine Insurance Act.

The principles to be applied in adjusting losses in the case of valued policies are the same as in the case of open policies. If at the time of the loss only a portion of the freight, to which the valuation was intended to apply, is at risk, the assured can only recover in respect of the loss of such portion, and he will recover such proportion of the valuation as the freight lost bears to the whole freight intended to be insured. (*b*) Similarly, if at the time of the loss, part of the freight, which was at risk, has been earned and withdrawn from the risk.

The Main, [1894] P. 320; 63 L. J. ADM. 69; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424,

was an action on a policy of insurance for £1500 upon freight valued at £5500 upon the steamship *Main*, at and from New Orleans to Liverpool, the insurance to commence upon the freight from the loading of the goods on board the ship.

FACTS.—The policy was effected while the vessel was on her way to New Orleans in anticipation of a full homeward cargo, and at the date of the policy the valuation was reasonable and proper upon a full cargo, having regard to the rates of freight then current at New Orleans, and to the engagements of cargo for the vessel. But on the way out the vessel met with an accident, and during the time occupied in repairs the rates of freight declined considerably, and the greater part of the engagements of cargo had to be cancelled. After some months' delay the vessel sailed for Liverpool with a full cargo, the total freight

(*b*) "If the freight of a whole homogeneous cargo is conclusively presumed to be worth the valuation in the policy, there seems to be no reason why the freight of one half of it should not be presumed to be worth one half of the valuation," per HOLMES, J., in *Boardman* v. *Boston Marine Insurance Co.* (1888), 146 Mass. R., p. 452 (Am.); *see* also *The Main*, [1894] P., p. 324.

of which amounted to £3250, of which £952 was paid in advance. In the course of the voyage the vessel was lost by fire, and the total freight at risk, £2298, was also lost. The plaintiffs collected under other policies the sum of £3250, and the defendants contended that they were not entitled to recover any further sum, as they had been fully indemnified.

Held that the valuation was binding, but that as freight to the amount of £952, had been paid in advance, and was, therefore, not at risk, the valuation of £5500, which was intended to refer to the gross freight of the ship, must be reduced by £1611, being the proportion upon the basis of the valuation of the prepaid freight to the gross freight, leaving £3889 as the value at risk, and as, of this sum, the plaintiffs had received £3250, the amount recoverable from the defendants was £639, with a small proportionate return of premium.

Fay v. *Alliance Insurance Company* (1860), 16 Gray. 455 (Am.),

was an action on a policy of insurance for 12,500 dollars, upon the freight of the ship *Columbia*, valued at 25,000 dollars.

Facts.—The vessel arrived at her port of discharge and delivered a portion of the cargo, but before the balance could be delivered, the ship and cargo were destroyed by fire, and the freight lost. The whole freight list of the vessel amounted to 28,183 dollars, and the freight actually received to 8283 dollars.

Held that the underwriters were responsible only for the proportion of the amount of the entire valuation of freight in the policy, which the freight actually lost bore to the actual value of the entire freight.

It may, however, be impossible to ascertain the proportion which the freight lost bears to the whole subject to which the valuation was intended to apply, and it may, therefore, be impossible to ascertain the amount which the assured upon the basis of the valuation is entitled to recover. In such a case, although the valuation cannot be given its full effect, it must not be disregarded. The policy will

be construed as an open policy, but the proportion between the sum insured and the amount of the valuation will determine the proportion of the loss for which the underwriter will be responsible.

Denoon v. *Home & Colonial Assurance Company* (1872), L. R. 7 C. P. 341; 41 L. J. C. P. 162; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309,

was an action on a policy for £1000, on freight of the *Sandringham*, valued at £2000.

Facts.—The vessel sailed from Calcutta having an board 360 coolies and 1200 bags of rice. The passage money of the coolies was £1944, and the bill of lading freight for the rice was £1412. During the voyage the vessel stranded and the rice and the freight payable in respect of it were lost. The coolies were saved and the passage money for them paid.

The plaintiff contended that the policy being on "freight" did not cover the passage money, and was intended to cover only the freight of the rice, and that, as there had been a total loss of freight, he was entitled to recover a total loss under the policy.

Held that the policy covered only the freight of the rice and not the passage money, but that if the passage money had come within the terms of the policy, the intention of the assured to cover only the freight, not having been communicated to the underwriters, must be disregarded; that as the valuation of freight in a valued policy *primâ facie* refers to a full cargo, or the charter of the entire ship, and there was nothing to show the underwriters that the valuation was on less than such full freight, the policy, which was for £1000 on freight valued at £2000, must be treated as an open policy for half the loss of freight, not exceeding in any case £1000, and that as the total loss of freight was £1412, the plaintiff could only recover £706.

The preceding remarks have dealt with the principles of adjustment to be applied in the case of policies which cover a single voyage. More difficult questions arise in those cases where the policy contemplates that successive freights will be at risk, as for instance in the case of a policy for a succession of voyages, or in the case of a

time policy. The question how, in the case of insurances on goods which contemplate successive cargoes, the losses should be adjusted, has been discussed at great length by continental writers, and the conclusion at which they have arrived is that in the case of a policy which contemplates that the cargo at risk will change from time to time, no account is to be taken of goods which may have been withdrawn from the vessel, or have not yet been put on board, and that only goods at risk at the time of the loss are to be considered as the datum with which the amount insured should be compared in order to ascertain the proportion of the loss recoverable under the policy. (*c*) This view has been followed in two American cases, and there are dicta in the case of *Crowley* v. *Cohen* (*d*) which suggest that this may be the correct rule to be applied in the case of ordinary policies on fluctuating cargoes. (*e*) In the case of *The Columbian Insurance Company* v. *Catlett* (*f*), a vessel had sailed from Alexandria for St. Thomas with a cargo worth 16,000 dollars. A portion of the cargo was sold at St. Thomas, and the vessel with the balance of the cargo, proceeded to Cape Haytien, where she was lost. "The next question that arises is, how the loss is to be apportioned. The argument on behalf of the company is, that as part of the cargo was landed at St. Thomas, the amount risked by them is to be diminished by their proportion of the cargo so landed. In short, that the loss is now to be made up by them with reference to the value of the whole cargo on board, when the risk first attached, and not with reference to the value on board at the time of the loss, notwithstanding it exceeded the amount insured. We are of a different opinion. We think the true intent and object of the policy was to cover an insurance of 10,000 dollars during the whole voyage out and home, so long as the assured had that amount of property on board. . . . The loss, therefore, must be apportioned in the proportion which the sum insured

(*c*) *See* Emerigon, ch. xiii., sect. 8, where the authorities are collected.

(*d*) (1832), 3 B. & Ad. 478.

(*e*) A different principle was applied in the case of *Tobin* v. *Harford* (1864), 17 C. B. (N. S.) 528, but in this case the policy was not construed as being a policy on cargo generally, that is to say, on any cargo which the vessel might have on board, but as being a policy on the cargo which was originally put on board the vessel at the commencement of the voyage—a trading voyage, and on the cargo which was obtained by barter in place of the original cargo: cf. *Haven* v. *Gray* (1815), 12 Mass. R. 71 (Am.).

(*f*) (1827), 12 Wheaton 383 (Am.).

bears to the amount of value on board at the time of the loss, that is, as 10,000 dollars bears to $12,328\frac{25}{100}$ dollars." (*g*)

The American Insurance Company v. *Griswold* (*h*) was an action on a policy of insurance for 20,000 dollars on goods on board the *China*, for the term of eighteen months. The vessel sailed from New York for South America with a cargo of the value of 47,096 dollars. The vessel called at Callao, and there landed a portion of the cargo, leaving cargo to the value of 27,050 dollars on board, which was forcibly seized by the military authorities at Callao, and it was held that the plaintiff could recover for a total loss. "Here is an insurance upon goods to be laden on board a vessel for a trading adventure for eighteen months, with liberty to the assured to extend it to two years, at the same rate of premium without reference to any particular voyage, or any ports or places of lading or discharge, or any specific cargo upon which the risk was to attach for the whole eighteen months or two years. Both parties, therefore, understood and expected that the whole, or particular parts of the cargo, would be frequently changed in the course of the eighteen months, either by the voluntary acts of the assured, or his agents, or by perils which were not insured against; and both must have intended that the risk, to the extent of the 20,000 dollars, should attach to any goods remaining on board from time to time, as often as such changes should occur, provided that goods to that amount were on board at the time any loss should occur by the perils insured against. . . . A policy of insurance upon such a trading voyage, or upon time merely, where the vessel is to sail upon such a voyage, is in the nature of a new insurance upon the new cargo, or the goods remaining at risk, every time the cargo is increased or diminished otherwise than by the perils insured against." (*i*)

Crowley v. *Cohen* (*k*) was an action on a policy of insurance for twelve months to the amount of £12,000 on goods to be carried on board of thirty boats belonging to the assured, which were engaged in the transportation business on a canal. One of the boats was sunk in the canal having on board goods to the value of £1700, and it was held that the plaintiff could recover that proportion of the loss which £12,000 bore to the whole value of the goods afloat at the time of the loss. "As to the mode of calculating the indemnity, the defendant

(*g*) Per STORY, J., at p. 395.
(*h*) (1835), 14 Wendell, 399 (Am.).
(*i*) Per WALWORTH, C., at p. 478.
(*k*) (1832), 3 B. & Ad. 478.

insists that this is to be done by ascertaining the proportion which £12,000 bears to the whole value of goods carried during the year, and allowing the assured such a proportion of the amount of loss. But the rule of construction relied on by the defendant is never adopted in cases of policy on goods with liberty to change the cargoes. Here the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs will recover such a proportion of their loss as £12,000 bears to the value of all the property on board all the boats at the time of the accident, if that value exceed £12,000; if not, they will be entitled to the whole amount lost." (*l*)

In the case of *Davy* v. *Hallett*, (*m*) where the policy was for successive voyages out and home, and freight on the homeward voyage was lost after full freight for the outward voyage had been received, KENT, C.J., used language which suggests that the same principle applies to insurances on freight. "Another objection to the recovery in this case is, that freight, to the amount of 2000 dollars, had already, during the course of the same voyage, been earned and received by the plaintiff. But the present insurance was not upon the totality of freight for the whole voyage, but upon so much freight in that voyage as would amount to 2000 dollars. . . . The present case is analogous to that cited in 2 Valin, 87, and 2 Emerigon, 39, 40, in which one caused an insurance to be made to the amount of 1000 livres upon goods on board a vessel from America to Marseilles. The vessel sailed with a cargo to the amount of 3000 livres and discharged two-thirds thereof at Cadiz, leaving goods on board for the remainder of the voyage to the amount of the insurance. It is the opinion of these authors, and the same is confirmed by Pothier, that the policy was not thereby reduced two-thirds in value, but operated still upon all the cargo on board, to the amount of 1000 livres."

It is, however, submitted that this principle does not apply to an insurance on freight. It has been seen (*n*) that, where the policy covers a voyage consisting of successive passages, during which successive freights will be at risk, the policy is, in the absence of intention or indication to the contrary, to be construed as an insurance

(*l*) Per Lord TENTERDEN, C.J., at p. 486. (*m*) (1805), 3 Caines, 16 (Am.).
(*n*) *See ante*, pp. 89–91.

of the freight pending during each passage. For the purpose of adjusting a loss incurred during any particular passage the policy should be treated as a policy for that particular passage, and the correct principle, it is submitted, where the policy covers the freight of successive voyages or passages, is to keep each voyage or passage distinct in the same way as each voyage or passage is kept distinct for the purpose of calculating the particular average losses excluded by the memorandum. (*o*) To take an illustration. A policy is effected on freight at and from port A to port B, and at and thence back to port A. Cargo, the freight of which will amount to £5000, is put on board at A to be carried to B, and of this freight £2500 is earned. Before the balance of the cargo can be delivered and the freight payable in respect of it can be earned, the vessel and cargo are destroyed, and the balance of the outward freight, amounting to £2500, is lost. In this case, it is submitted, the assured would not be entitled to recover under the policy for a total loss, and would only be entitled to recover a moiety of the sum insured.

If losses occur during successive voyages, is the underwriter liable to the extent of the sum insured in respect of each of these successive losses, or is his total liability limited to the amount of the sum insured? In an American case it has been suggested that to the extent to which the underwriter has settled losses under the policy, his liability for the future is reduced. "The total amount for which the underwriters are to be made liable during the whole time or voyage, except for general average or other expenses incurred for their benefit in preserving or attempting to recover the property insured, cannot exceed the amount of their subscription to the policy, upon which amount the premium of insurance is calculated. In such a case, therefore, if the policy was underwritten for 20,000 dollars, and one half of the first cargo was lost by the perils insured against, so that the underwriters had become liable to pay 10,000 dollars on account of that loss, they would, upon the next change of the cargo, only be underwriters for the other half of their original subscription, and the shipper would be considered as his own insurer for the residue

(*o*) *See Stewart* v. *Merchants Marine Insurance Co.* (1885), L. R. 16 Q. B. D. 619; *Price* v. *A.I. Ships Small Damage Insurance Association* (1889), L. R. 22 Q. B. D., p. 589; Phillips, sect. 1780.

of such new cargo, for the purpose of apportioning a partial loss thereon between him and the underwriters." (*p*)

It is submitted, however, that this view is not correct, and that in cases where the policy contemplates successive voyages in respect of which there may be successive losses, the underwriter is liable to the extent of the sum insured for losses incurred during such successive voyages, even though the aggregate sum which the underwriter may be called upon to pay exceeds the sum mentioned in the policy as being the sum insured. It must be remembered that the sum mentioned in the policy as being the sum insured is not the limit of the underwriter's liability. Its function is to indicate the proportion of the amount which may be covered by the policy for which the underwriter is to be responsible, and if the policy is intended to cover the freights of successive voyages, the sum insured indicates the proportion of each of these successive freights, for which the underwriter is to be responsible.

Where the policy covers the freight of successive voyages, it should be construed, in the absence of intention or indication to the contrary, as covering during each successive voyage only the freight pending in respect of that voyage. This construction was adopted in the American case of *Lincoln* v. *Boston Marine Insurance Company*, and is, it is submitted, correct. It may involve hardship upon the assured in those cases where two voyages overlap, and where he has at risk both the freight of the voyage then ending and also the freight of the succeeding voyage. But, on the other hand, it would be unreasonable to construe the policy as meaning that the underwriter is to be liable at the same time in respect of two distinct freights. Until the insurance of the pending freight has come to an end, the insurance of the succeeding freight, it is submitted, will not arise. It has been seen (*q*) that where the policy covers a single voyage and the assured has at risk two freights which come within the terms of the policy, the policy is to be construed, in the absence of intention or indication to the contrary, as an insurance of the freight pending in respect of the voyage insured. Similarly, where the policy covers successive voyages, it should in the absence of any

(*p*) Per WALWORTH, C., in *American Insurance Co.* v. *Griswold* (1835), 14 Wend., p. 479 (Am.).

(*q*) *Ante*, p. 88.

intention or indication to the contrary be construed as an insurance, during each successive voyage, of the freight pending in respect of that voyage.

Lincoln v. *Boston Marine Insurance Company* (1893), 159 Mass. R. 337 (Am.).

was an action on a policy of insurance for 5000 dollars on freight under deck, on board or not on board the ship *W. H. Lincoln*, at and from New York to Seattle, and at and thence privilege lumber port to ports discharge and/or loading West Coast South America, and at and thence to port of advice and/or discharge in Europe or Atlantic United States. The freight was valued at 15,000 dollars. The policy was subsequently altered to cover a voyage to Sydney, N.S.W., and at and thence to port of advice and/or discharge in Atlantic United States.

FACTS.—The vessel after completing her voyage to Seattle proceeded to Sydney, N.S.W., where she arrived safely with a cargo of lumber on November 29, 1891. On December 10, 1891, the vessel was chartered for a voyage from Sydney with a cargo of coal. On the evening of January 4, 1892, after the vessel had discharged about two-thirds of her cargo, a fire broke out and the master scuttled the vessel in the hope of thereby saving her and the cargo. The remaining cargo was saved and the freight on it was earned, but the vessel was a complete wreck and was sold, and the chartered freight was lost. The assured contended that he was entitled to recover for a total loss of freight, or at any rate that when the vessel was unloading, as fast as the policy became unnecessary for the protection of the freight of the discharging cargo, it should cover the freight of the next cargo, so as to keep up a constant insurance of 5000 dollars upon freight valued at 15,000 dollars.

Held that while the vessel was unloading the policy covered only the freight of the voyage then ending, and did not insure any part of the freight of the next succeeding voyage, and that the plaintiff, therefore, was not entitled to recover.

Whenever a loss, whether total or partial, has been paid, the underwriter who has paid it acquires a right either by abandonment or subrogation to whatever may be recoverable by the assured with respect to the loss. The doctrine of abandonment is closely related to that of subrogation, and they are apt to be confused. Abandonment applies only to cases of total loss, and has the effect of transferring to the abandonee the right to the property in what remains of the thing abandoned and all rights incident to the property. (*r*) Subrogation is an equitable principle incident to all contracts of indemnity under which a person, who has made good or is liable to make good a loss, is entitled to the benefit of every right and remedy by which that loss has been or can be diminished.

An underwriter to whom freight is abandoned, is entitled to all the rights of the assured in that freight, (*s*) and if the assured earns the freight, he holds it in trust for the underwriter to whom he has abandoned it. (*t*) If the freight can be earned by transhipping the cargo, the underwriter on freight is entitled to the benefit of that right. (*u*)

The position of the underwriter on freight is, however, usually complicated by the fact that the ship will also have been insured and may have been abandoned to the underwriter on ship. (*x*) An abandonment of the ship carries with it the right to any freight earned by the vessel subsequent to the abandonment or to the time to which the abandonment relates, (*y*) and this freight passes not to the underwriter on freight but to the underwriter on ship. (*z*) The position, therefore, of an underwriter on freight, to whom abandonment has been made, may be affected by the fact that the ship is also insured and has been abandoned to the underwriter on ship.

(*r*) *See* per Lord BLACKBURN in *Simpson* v. *Thomson* (1877), L. R. 3 A. C., p. 292.

(*s*) *See Barque Robert S. Besnard Co.* v. *Murton* (1909), 14 Com. Cas., p. 277; Marine Insurance Act, sect. 63.

(*t*) *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Thompson* v. *Rowcroft* (1803), 4 East. 34.

(*u*) *Hickie* v. *Rodoconachi* (1859), 4 H. & N. 455; *Sea Insurance Co.* v. *Hadden* (1884), L. R. 13 Q. B. D., p. 715.

(*x*) *See ante*, p. 157.

(*y*) *Stewart* v. *Greenock Marine Insurance Co.* (1848), 2 H. L. C. 159; Marine Insurance Act, sect. 63 (2).

(*z*) *Davidson* v. *Case* (1820), 2 B. & B. 379.

and in certain cases he will be entitled to rely on this fact in order to resist a claim for a loss of freight. Thus the underwriter on freight will not be liable if the shipowner loses his freight because he has abandoned the ship to the underwriters on ship under circumstances which did not justify the abandonment. (*a*) Nor will he be liable, if the shipowner loses the freight after the voyage is completed and the freight is earned, because he has to hand it over to the underwriters on ship, to whom he then elects to abandon the ship by reason of injuries received in the course of the voyage. (*b*)

The position is, however, different if the abandonment to the underwriters on ship is made before the freight is earned, and is justified by the facts. Thus if a ship which has been damaged by perils insured against to such an extent as not to be worth the cost of repairs, is justifiably abandoned to the underwriters on ship, and is repaired by them and subsequently completes the voyage and earns freight, the assured will, it is submitted, be entitled to recover for the loss of freight, as he was under no duty to make for the benefit of the underwriter on freight repairs which from a commercial point of view would be unreasonable.(*c*) Or if a vessel, after being captured or seized and taken out of the possession of the shipowner under circumstances which justify him in treating her as a constructive total loss, is unexpectedly recaptured or released, and earns freight for the underwriters on ship to whom she has passed by abandonment, in this case also, it is submitted, the assured may recover for the loss of freight, and the underwriter on freight cannot complain because nothing has passed to him by the abandonment. (*d*) It might be argued that but for the abandonment to the underwriters on ship he would have been entitled to the freight ultimately earned by the vessel, and that the assured by abandoning to the underwriters on ship has wrongfully deprived him of this freight. This argument, however, loses sight of the true nature of an insurance on freight. The underwriter undertakes to indemnify the assured if by reason of the loss of or damage to the ship or cargo by perils

(*a*) *M'Carthy* v. *Abel* (1804), 5 East. 388, *ante*, p. 132.

(*b*) *Scottish Marine Insurance Co. of Glasgow* v. *Turner* (1853), 1 Macq. 334, *ante*, p. 126.

(*c*) *Coolidge* v. *Gloucester Marine Insurance Co.* (1819), 15 Mass. 341 (Am.); *Troop* v. *Merchants Marine Insurance Co.* (1886), 13 Sup. Can. R. 506 (Can.); *ante*, p. 123.

(*d*) *See ante*, p. 159.

insured against he is prevented from earning freight. If the ship is captured or seized and is justifiably abandoned, she is lost to the shipowner and he thereby loses the freight or the possibility of ever receiving it if earned. "The assured has sustained a total loss of the freight, if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment he has no longer the means of earning the freight or the possibility of ever receiving it if earned, such freight going to the underwriters on ship. In the present case, when the ship was at Pernambuco, the cargo taken out, and the damage to the ship very far exceeding her value, and such as the owner had no means of completing, except at a ruinous expense, if at that time he abandons the ship to the underwriters, as the law allows him to do, the freight is as much lost to him as if the ship had been captured and placed altogether out of his control." (*e*)

In practice the difficulties which have just been discussed are not likely to arise frequently in the future, as most policies on hull contain the Institute Clauses, which provide that "in the event of total or constructive total loss no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." By this clause the underwriters on ship forego their claim to freight pending at the time of the casualty, and this freight, therefore, will pass under the abandonment to the underwriters on freight subject to certain deductions in respect of the cost of earning it. The question as to the deductions to be allowed was discussed in the case of *Sharp* v. *Gladstone*. (*f*) In this case a ship was detained under the Russian embargo and notice of abandonment was given to the underwriters on ship and freight, and accepted. No question arose as to which underwriters were entitled to the freight ultimately earned. It was assumed that the underwriters on freight were entitled to it, and the only questions under consideration were whether any and what deductions should be made out of the freight. The items in dispute were: (1) Expenses of shipping the cargo in respect of which the freight was paid, and the expenses of the ship and crew at St. Petersburg and Elsinore, including port charges. (2) Insurance on same. (3) Wages and provisions of master and

(*e*) Per TINDAL, C.J., in *Benson* v. *Chapman* (1843), 6 M. & G., p. 810.
(*f*) (1805), 7 East. 24.

crew from the time they were liberated in Russia till discharged in Liverpool. (4) Their wages during the detention under the embargo. (5) Charges paid at Liverpool on ship and cargo. (6) Insurance on ship for the homeward voyage. (7) Diminution of ship's value by wear and tear on the homeward voyage.

With regard to these items it was held that the expenses of shipping on board the homeward cargo, being altogether for the benefit of the underwriters on freight, should fall exclusively on them; that the expenses of the ship and crew, and the insurance thereon, the wages and provisions of the master and crew between their liberation from the embargo and the ship's discharge, and their wages during the detention should be deducted from the salvage and apportioned between the two sets of underwriters according to their respective interests; that the charges on ship and cargo in the port of discharge, the cost of insuring the ship for her homeward voyage, and the diminution of value thereon by wear and tear must be struck out as they could not be charged on the freight. (*g*)

In order to protect an assured whose claim to recover for a loss of freight might be met by the objection that the loss was due, not to any of the perils insured against, but to his action in abandoning the ship to the underwriters on ship, a provision is sometimes found in policies to the effect that the amount insured on freight shall be paid in the event of the total loss, actual or constructive, of the vessel. If, however, by the terms of the policy on ship, no claim is to be made by the underwriters on ship for freight, so that the shipowner is entitled to any freight which may be earned on the voyage, he must, if he elects to claim for a loss of freight, give to the underwriters on freight the benefit of the freight so earned.

Coker v. *Bolton*, [1912], 3 K. B. 315; 82 L. J. K. B. 91; 107 L. T. 54; 12 Asp. M. C. 231; 17 Com. Cas. 313; 56 S. J. 751,

was an action on a policy of insurance on freight of the steamship *Ivy*, valued at £950. The policy contained the Institute Time Clauses, which provided that: "In the event of the total loss, whether absolute or constructive, of the steamer, the amount

(*g*) *See* also *Barclay* v. *Stirling* (1806), 5 M. & S. 6, *ante*, p. 95.

underwritten by this policy shall be paid in full, whether the steamer shall be fully or only partly loaded, or in ballast, chartered or not chartered."

FACTS.—While on a voyage from the Baltic to Manchester with a cargo of grain, the *Ivy* stranded in the River Mersey and became a constructive total loss. At the time of the stranding the *Ivy* was insured under a time policy on hull which provided that, "in the event of a total or constructive total loss no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." Notice of abandonment was given to the underwriters of the hull policy and was not accepted, but an arrangement was made without prejudice, under which the Liverpool Salvage Association towed the *Ivy* to Manchester and discharged her cargo there. The sum of £630 12*s*. was paid to the plaintiff for freight. Notice of abandonment was also given to the defendants, which was not accepted, but they agreed to place the plaintiff in the same position as if a writ had been issued. The plaintiff claimed to be paid in full the amount of the valuation. The defendants contended that they were entitled to a deduction in respect of the freight which had been received by the plaintiff.

Held that the defendants were entitled to a deduction in respect of the freight which had been received by the plaintiff. (*h*)

The doctrine that the abandonee of the ship was entitled to all pending freight ultimately earned by the ship was long a subject of vexed discussion in this country, (*i*) but it was finally set at rest by the decision in the case of *Davidson* v. *Case*.

Davidson and Others v. *Case* (1820), 2 Br. & B. 379 ; 8 Price, 542 ; 5 Moore, 116 ; 5 M. & S. 79 ; 17 R. R. 280,

was an action for money had and received.

(*h*) *See* also *United Kingdom Mutual Association* v. *Boulton* (1898), 3 Com. Cas. 330.

(*i*) *See Thompson* v. *Rowcroft* (1803), 4 East. 34 ; *Leatham* v. *Terry* (1803), 3 B. & P. 479 ; *M'Carthy* v. *Abel* (1804), 5 East. 388 ; *Sharp* v. *Gladstone* (1805), 7 East. 24 ; *Ker* v. *Osborne* (1808), 9 East 378.

FACTS.—The owners of a vessel called the *Fanny* insured the ship with one set of underwriters for £7000, and subsequently insured the freight with other underwriters for £4000. The vessel was captured by a privateer, whereupon the owners gave notice of abandonment to the respective underwriters, who accepted the same. The vessel was afterwards recaptured, delivered her cargo, and earned the freight. An agreement was made between the owners of the vessel and the underwriters on ship, to which the underwriters on freight were not parties, that the owners should receive the freight for the use and benefit of all persons who should legally be entitled thereto, and this action was brought by an underwriter on ship to recover a proportion of the money received by the owners for freight.

Held that the underwriters on ship were entitled to the freight, and that the plaintiff could recover. (*k*)

The principle of this decision is now embodied in section 63 of the Marine Insurance Act, which enacts: (1) "Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto. (2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; (*l*) and where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss."

The freight, to which the abandonee is entitled, is any freight in course of being earned, and which is earned by the ship subsequent to the casualty causing the loss. If some freight has been actually earned before the casualty took place, by payment of part, or delivery

(*k*) In America a different principle has been adopted. The amount accruing on account of the part of the voyage performed prior to the constructive total loss goes to the assured or to his underwriters on freight in his stead, and the subsequent portion belongs to the underwriters to whom the ship is abandoned: *United Insurance Co.* v. *Lenox* (1802), 2 Johns. 443; *Marine Insurance Co.* v. *United Insurance Co.* (1812), 9 Johns. 186; *Mason* v. *Marine Insurance Co.* (1901), 110 Fed. R. 452: Phillips, sects. 1738—1742.

(*l*) See *The Red Sea*, [1895] P., p. 299.

of part of the cargo, under the terms of the charterparty, at an antecedent port, or by an agreement between the shipowner and the merchant whereby freight *pro rata* has been due on part of the goods, the freight so paid or so apportioned would not vest in the abandonee of the ship. (*m*)

The Red Sea (1895). P. 293 ; (1896). P. 20 ; 73 L. T. 462 ; 65 L. J. ADM. 9 ; 44 W. R. 306 ; 8 Asp. M. C. 102,

was an action by underwriters on the hull and machinery of the steamship *Red Sea*, against the owners to recover a balance of freight.

FACTS.—The *Red Sea* was chartered to carry a cargo of timber from Pensacola to West Hartlepool, and by a clause in the charterparty the charterers were to advance "sufficient cash for ship's ordinary disbursements, ship paying 2½ per cent. commission, including insurance." The sum of £1679 19*s*. 10*d*. was advanced to the master. The vessel was wrecked just outside West Hartlepool, and was justifiably abandoned to the plaintiffs. The cargo, however, was delivered and freight earned. The gross freight amounted to £4279, but from this the shipowners claimed to deduct the sum of £1679 19*s*. 10*d*., the amount of the cash which had been advanced. This action was brought by the underwriters on ship to recover this sum.

Held that the cash advance was equivalent to prepaid freight, and as such did not pass to the plaintiffs on the abandonment of the vessel, and that the plaintiffs could not recover. (*n*)

Where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss,(*o*) but cannot claim freight for their carriage over the whole voyage.

(*m*) Arnould, sect. 1177.

(*n*) Cf. per LE BLANC, J., in *Thompson* v. *Rowcroft* (1803), 4 East., p. 44 ; *Luke* v. *Lyde* (1759), 2 Burr. 882 ; per Lord CAMPBELL, C.J., in *Miller* v. *Woodfall* (1857), 8 E. & B., p. 504.

(*o*) Marine Insurance Act, sect. 63 (2).

Miller v. *Woodfall* (1857), 8 E. & B. 493; 27 L. J. Q. B. 120; 4 Jur. (N. S.) 302; 112 R. R. 663,

was a claim brought by the underwriters of the ship *Melbourne* for freight in respect of a cargo carried from New Brunswick to Liverpool.

FACTS.—While on a voyage from New Brunswick to Liverpool with a cargo of timber, shipped on owners' account, the vessel stranded off Southport, about 20 miles from Liverpool. The owners thereupon gave notice of abandonment to the underwriters on ship, which was ultimately accepted by them. Part of the cargo was discharged from the ship and carried in lighters to Liverpool at the expense of the owners. The ship having been so lightened afterwards floated off and was towed with the remainder of the cargo to Liverpool. Bills of lading had been issued but no freight had been named in them.

Held that nothing in the nature of freight for the carriage of the shipowners' goods passed to the abandonees, but that they were entitled to an allowance for the carriage of the part of the goods from Southport to Liverpool in the ship, to be estimated at the current rate of freight.

By subrogation the underwriter on freight, who has paid a loss, is entitled to the benefit of every right and remedy by which the loss has been or can be diminished. Thus, if a vessel is so damaged that she cannot carry the original cargo, but is still able to carry some cargo on the voyage insured, the underwriter will be entitled to any freight which has been, or could have been, earned in respect of such cargo. (*p*) If the original cargo is so much damaged that it cannot be carried to its destination, but other cargo can be carried by the vessel on the voyage insured, the underwriter on freight will be entitled to the benefit of the freight which is or which might have been received in respect of such substituted cargo. If the cargo is landed under circumstances which give rise to a claim for *pro rata* freight, the underwriter will be entitled to the benefit of such *pro rata*

(*p*) Phillips, sect. 1644. *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Gayner* v. *The Sunderland Joint Stock Premium Association* (1884), Cab. & E. 293, *ante*, p. 162.

freight, and if the freight was lost under circumstances which give rise to a claim for damages, the underwriter will be entitled to the benefit of such claim.

The Thyatira (1883), 8 P. D. 155; 52 L. J. ADM. 85; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. C. 147, 178,

was an action for compensation brought against the owners of the *Thyatira*.

FACTS.—Messrs. Vaughan & Co. were the owners of the ship *Atmosphere*, in which they shipped a cargo of 1650 tons of their own coal from Liverpool to Valparaiso. The price of the coal at Liverpool was 9*s*. per ton, and it would have fetched from 30*s*. to 33*s*. per ton at Valparaiso. Messrs. Vaughan & Co., desiring an advance on this cargo, applied to Messrs. Cockbain & Co., and the latter agreed to make it on the terms that they were given bills of lading together with policies of insurance to cover them in case of loss. This arrangement was carried out in the following way. The master of the *Atmosphere* signed bills of lading for the coal, deliverable to Messrs. Vaughan & Co. or assigns, they paying freight at the rate of 23*s*. per ton, and he indorsed on the bills of lading a receipt for £1000 on account. An insurance was effected on advance freight valued at £1000.

The *Atmosphere*, while on her voyage to Valparaiso, was run down and sunk by the *Thyatira*, and this action was brought by the plaintiffs for the benefit of the underwriters who had paid the £1000 insured by them, to recover compensation for the loss.

Held that the plaintiffs were entitled to recover the sum of £1000, and that the insurers were subrogated to the rights of the plaintiffs.

The Sea Insurance Company v. *Hadden and Another* (1884), 13 Q. B. D. 706; 53 L. J. Q. B. 252; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. C. 230,

was an action to recover the sum of £880 19*s*.

FACTS.—The plaintiffs were an insurance company; the defendants were the owners of a vessel called the *Queen of the East*. The vessel was chartered for a voyage from Liverpool to Cardiff,

there to take on board a cargo of coals for Bahia, freight to be paid at the rate of 21*s.* per ton. The vessel sailed for Cardiff, but on the voyage was seriously damaged in a collision with a steamer called the *Cassandra*, and was sold. The defendants had effected with the plaintiffs a policy of insurance on hull for £1000, the ship being valued at £4000, and they received under the policy settlement on the basis of a constructive total loss. Admiralty proceedings were subsequently instituted and the defendants recovered from the owners of the *Cassandra* a sum of money as compensation for loss of the *Queen of the East*, and of the freight under the charterparty.

The plaintiffs then commenced the present action to recover the sum of £880 19*s.*, being as to £630 11*s.* 9*d.*, the proportion of damages recovered by the defendants in respect of the loss of the ship, and as to £250 7*s.* 3*d.*, the proportion recovered in respect of the loss of the freight. The defendants paid into Court the sum of £630 11*s.* 9*d.*, and denied any liability to pay to the plaintiffs the sum of £250 7*s.* 3*d.*

Held that the plaintiffs could not recover, as the damages recovered in respect of the freight were salvage, to which the underwriters on freight were entitled.(*q*)

Dufourcet & Company v. *Bishop and Another* (1886), 18 Q. B. D. 373 ; 56 L. J. Q. B. 497 ; 56 L. T. 633 ; 6 Asp. M. C. 109,

was an action brought by the owners of a cargo, shipped on board the *Aurora*, against the owners of the ship for damages for non-

(*q*) As to the apportionment of damages where a lump sum is recovered in respect of the loss of the vessel and freight, *see Thames & Mersey Marine Insurance Co.* v. *British & Chilian Steamship Co.* (1915), 31 T. L. R. 275.

In the American case of *Mason* v. *Marine Insurance Co.* (1901), 110 Fed. R. 452, it was held that the underwriters on a ship, which was sailing under a charter and which had been sunk in collision, were entitled to damages, based upon the charter freight, for loss of earnings recovered from the wrongdoing vessel. In this case the vessel was not a constructive total loss and after being raised was repaired, but the underwriters on ship had paid a total loss. The grounds of the decision were that the property in the vessel had been transferred to the underwriters, and the damages, though based upon the charter freight, were not for a loss arising upon the charter, but for the loss of prospective earnings of the ship while she was being repaired, the charter being used as evidence merely as to how much they would probably have been worth.

delivery of the cargo, the cargo having been lost by the negligence of the defendants.

FACTS.—The plaintiffs were the owners of 1500 tons of superphosphate which had been shipped in the *Aurora*, and they had paid £600 as advanced freight. They had received from their underwriters an indemnity both for the price of the goods and for the advanced freight, and this action was brought for the benefit of the underwriters on the advanced freight to recover the sum of £600.

Held that the plaintiffs were entitled to recover on behalf of the underwriters, as part of the damage, the amount of the advanced freight.

The London Assurance Corporation v. *Williams* (1892), 9 T. L. R. 96, 257,

was a case of insurance on chartered freight, in which the question was as to the right of the underwriters, who had paid for a total loss of freight, to recover *pro rata* freight paid to the shipowner under foreign law.

FACTS.—The defendant, the owner of the ship *Canute*, effected an insurance with the plaintiffs on chartered freight valued at £1660. The *Canute*, in the course of a voyage from Pensacola to Barrow-in-Furness with a cargo of timber, was driven into Havanna, where she was condemned and sold for the benefit of all concerned. The captain could not procure a vessel to carry on the cargo, and it remained in his possession subject to his lien for general average. The underwriters on cargo sent some one out from England, and in order to free the cargo, entered into an agreement with the shipowner to pay according to the law and usage of Havanna. By the law of Havanna the ship was entitled to *pro rata* freight, and the shipowner recovered from the cargo owners the sum of £750.

Held that the underwriters on freight, who had paid a total loss of freight, were entitled to the benefit of the *pro rata* freight.

CHAPTER VII.

Summary.

Chapter I.—Freight as the Subject of Insurance.

Ships are built for the purpose of earning money by the carriage of goods. Merchants require ships to carry their merchandise. For this service they are willing to pay, and the remuneration thus payable is termed freight (p. 1).

The conditions under which a vessel may be employed differ widely, but speaking generally, shipowners offer the services of their vessels in two ways. Either the ship is put up for a defined voyage as a general ship and takes the goods of any person willing to ship in her, or the shipowner seeks for some one who will employ the vessel upon some voyage or during some period of time, for purposes and upon terms to be agreed with him (pp. 1, 2).

In whatever way a vessel may be employed, the remuneration payable is described comprehensively as freight. In the strict significance of the term freight is the remuneration payable for the carriage and safe delivery of goods. In practice it has a more extended application and designates, in addition to the remuneration payable for the carriage and delivery of goods that have been put on board a vessel, the remuneration agreed to be paid under a contract of affreightment relating to the use of a vessel or of space in a vessel or to the carriage of goods in a vessel which the shipowner undertakes to provide (pp. 2, 3).

In insurance law the term freight is not limited to the remuneration payable by some one in return for the services of the ship. A shipowner may employ his ship to carry his own goods. Freight will not be directly payable, but the shipowner will receive in the increased value of the goods due to the carriage a benefit equivalent to the benefit he would have received if he had been carrying the

goods of another, and this, though not strictly freight, is so like it that it has been held that it may be insured under that name (pp. 4–6).

The term "freight," then, as used in insurance law, may be described as the benefit derivable from the use or employment of a ship or a part thereof by the shipowner or other person entitled to such use or employment; it does not include passage money (p. 6).

Except in the case where a shipowner uses his vessel to carry his own goods, freight, whether it be the remuneration payable for the carriage of goods, or the remuneration payable for the use of a vessel or of space in a vessel or for the right to have goods carried in a vessel, results from some contract. The contract defines the amount of the remuneration, and the conditions upon which it is payable, and it is necessary in every case to consider the terms of the contract in order to ascertain the extent to which the right to freight has been affected by the perils insured against (pp. 6, 7).

Contracts of affreightment relating to the employment of a vessel vary widely in character and in their provisions. They may operate as a demise or lease of the ship, or they may merely give the right to the use of a vessel or of space in a vessel or to have goods carried in a vessel for a particular voyage or series of voyages or period of time (p. 7).

Such contracts of affreightment are usually embodied in a document called a charterparty, but no particular form of document is required. By the terms of most charterparties, the charterer undertakes to fill the vessel with goods for the carriage of which remuneration will be payable. In respect of these goods bills of lading will be issued, and under these bills of lading the rights and liabilities of the shipowner may be different from his rights and liabilities under the charterparty. But in so far as the freight insured is the freight payable under the charterparty, the rights and liabilities of the shipowner as defined by that document alone need be considered, for the shipowner cannot by voluntarily departing from its terms, increase the liability of the underwriters (pp. 7–9).

Freight may be made payable in many ways. It may be a lump sum freight of a definite amount, or a lump sum freight based upon

the capacity of the vessel, or the measure, weight, or character of the goods to be carried. It may be payable at a certain rate, and that rate may be the current rate, or a nominal rate, or a rate which varies with the nature of the goods shipped. It may be subject to deductions in respect of loss or damage to the goods. It may be payable in kind, but usually is payable in money. It is not even necessary that a rate of freight should have been agreed. In such a case, unless it is proved that the goods were to be carried gratuitously, a reasonable rate of freight will be payable, and this will usually be calculated at the ordinary rate ruling at the time when the shipment was made (p. 9).

Freight is usually due and payable when the services in respect of which it is to be paid have been completed, but it may be made payable in advance. In insurance law no distinction is drawn between freight payable in advance and freight payable when the services in respect of which it is to be paid have been completed, except in so far as it affects the question of insurable interest. Freight paid in advance may be insured as freight (pp. 9–11).

Chapter II.—Insurable Interests in Freight.

It has long been an established principle of English law that freight is a lawful subject of marine insurance (p. 12).

Freight is the benefit derived from the employment of a vessel. It follows, therefore, that before freight can come into existence, or before an insurable interest in freight can arise, employment must have been found for the vessel (p. 12).

This view has been criticised as being too narrow, and it has been suggested that a reasonable expectation of obtaining freight should be covered by an insurance on freight, but this view has not been adopted (pp. 12, 13).

This expectation of obtaining freight may, perhaps, be insured by a policy in which the interest is properly described (p. 13).

Is it sufficient in order to create an insurable interest in freight, that employment, from which freight will be derived, has been

obtained? Early decided cases imposed upon the ordinary insurance on freight a limitation to the effect that the assured must have an "inchoate right to the freight," an expression which has given rise to much difficulty and confusion as it has been used as referring both to the inception of an insurable interest and to the inception of the risk. In order to understand how this difficulty and confusion arose, it is necessary to trace the origin of the doctrine of the inchoate right to freight and to follow its development (pp. 13, 14).

An ordinary insurance upon freight has always been regarded as a contract of indemnity during the adventure in which the freight is to be earned. How this conception originated is not clear, but it was in all probability influenced by the fact that insurances on freight were effected by means of voyage policies, and by the peculiar nature and incidents of freight (pp. 14, 15).

When an insurance on freight for a voyage was effected, it was assumed that the shipowner would be sending his vessel on that voyage for the purpose of earning freight, and it was the freight to be earned on that voyage which, it was considered, was intended to be covered by the policy. To such a length was this view carried that in one case it was decided that the freight-earning voyage must be identical with the voyage insured by the policy, but this decision has not been followed (pp. 15, 16).

The second and the more important factor was the peculiar nature and incidents of freight. At Common Law no right to freight *qua* freight arose until the voyage was ended and the contract performed, but by the Law Maritime an inchoate right to the freight was considered to arise as soon as the vessel broke ground on the voyage. The fact that according to the Common Law and the Law Maritime no right to freight *qua* freight arose until the vessel had actually commenced to earn it by breaking ground on the voyage, undoubtedly influenced the view that an ordinary insurance on freight was intended to be an insurance of the freight which the vessel was in the course of earning (pp. 16, 17).

From the time that freight commenced to be earned, an inchoate right to the freight was said to arise, and it was this inchoate right

which was considered to be covered by the ordinary policy on freight (p. 17).

From a series of English cases it would seem that the doctrine of the inchoate right to freight was regarded in this country as referring to the inception of the risk. In America, on the other hand, the doctrine was regarded as referring to the inception of an insurable interest, but so long as an insurance on freight was treated as an insurance on the freight which the vessel was then in the course of earning, it was immaterial which view was adopted (pp. 17–22).

Whether treated as referring to the inception of the risk or to the inception of an insurable interest, difficult questions arose as to when the inchoate right to freight commenced, that is to say, as to when the freight began to be earned. There are dicta to the effect that the inchoate right did not commence until the vessel had broken ground on the freight-earning voyage, but the test as laid down in several cases was whether there had been an inception of the contract of affreightment, whether the employment in respect of which the freight was payable had been entered upon and in that way the adventure begun (pp. 22–24).

In the application of this test difficulties arose. The voyage contemplated by the contract of affreightment might not be a simple voyage from one port to another; it might be a double voyage out and home, or it might consist of a series of voyages. Some hesitation was felt in saying that freight to be earned during a homeward voyage was in course of being earned during the outward voyage. But in the various cases in which the point was raised, the Courts decided on the construction of the contracts of affreightment that the freight, although dependent on the completion of the homeward voyage, was in fact payable in respect of the whole contemplated voyage out and home. The outward voyage and the homeward voyage were not treated as separate adventures, but as parts of one entire adventure (pp. 24–28).

The voyages out and home might, however, be separate adventures, and it has been suggested that in such cases the vessel does not commence to earn the homeward freight until she is in a condition

to take in her homeward cargo, but this view has been rejected (pp. 28–31).

The question whether the freight has commenced to be earned is a question of fact. The propositions laid down in the decided cases as to when the freight began to be earned must not be regarded as inflexible rules of universal application, but as useful tests to be applied for the purpose of ascertaining whether the freight-earning voyage has in fact commenced or not (pp. 31–34).

It has been seen that according to the American view the doctrine of the inchoate right to freight referred to the inception of an insurable interest. This view has given rise to an impression that there cannot be an insurable interest in freight until the freight earning voyage has commenced. This impression is erroneous, for, as was said by Lord Esher, "No doubt as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insurable interest." The ordinary policy only covers freight from the time that it commences to be earned, but freight may be insured from the time that it is engaged, provided that the nature of the insurance is sufficiently indicated by the policy (pp. 34–40).

The foregoing outline has dealt with questions relating to an insurable interest in chartered freight. The term chartered freight, it is submitted, does not refer merely to freight payable under a charterparty, but means freight payable under a contract relating to the use and hire of a vessel or of space in a vessel or to the carriage of goods in a vessel which the shipowner undertakes to provide. No distinction has been drawn between contracts by charterparty and contracts in any form, or between contracts for the use of the whole vessel and contracts relating to the carriage of goods which would occupy only a small portion of the ship's carrying capacity (pp. 40–43).

With regard to ordinary freight, that is to say, the freight payable for the carriage of particular goods, an insurable interest, it is submitted, arises as soon as a contract is made with somebody for the shipment of the goods. The ordinary policy, however, will only cover such freight from the time that the assured may be said to

have an inchoate right to the freight. An inchoate right to this freight, it would seem, arises when the goods are put on board or as soon as the carriage is substantially ready to begin, namely, when the cargo is in readiness to be loaded, and the vessel is ready to receive it (pp. 43–46).

The expression freight in insurance law includes the benefit derivable by the shipowner from the employment of his own ship to carry his own goods. The ordinary policy does not cover this freight until the carriage is substantially ready to begin, but there seems to be no reason why a shipowner, who has goods which he definitely intends to carry on his own vessel, should not be entitled to insure the freight in respect of them, although they are not ready to be put on board, and the ship is not ready to receive them (pp. 46–50).

A shipowner may enter into a contract with a merchant under which he undertakes to provide a ship or space in a ship without specifying any particular vessel. In such cases, it is submitted, an insurable interest arises as soon as the assured has definitely allocated a vessel to the performance of the contract (p. 50).

The foregoing remarks have referred to the insurable interest of a shipowner. There are dicta in some of the early cases to the effect that, freight being an incident of the ownership of a vessel, a person who has no right either legal or equitable to a vessel, can have no insurable interest in the freight. There seems, however, to be no doubt that ownership of a vessel is not necessary in order to give an insurable interest in the freight (p. 51).

A charterer has an insurable interest in his sub-freight, but there is some controversy as to the extent of his insurable interest. It is submitted that he has an insurable interest in the gross amount of the freight at his risk (pp. 51–53).

Under ordinary circumstances, the charterer has no insurable interest in the freight he has to pay, but he may have an insurable interest in respect of his liability to pay full freight, although the goods arrive damaged, or in respect of his liability to pay a lump-sum freight although a large part of the cargo may be lost by perils of the sea, or if he agrees to pay dead-freight in the event of the ship being

prevented from discharging the outward and shipping a return cargo (p. 54).

An assignee has an insurable interest in the freight assigned to him (p. 54).

A mortgagee, to whom freight has been mortgaged, has an insurable interest in the freight, but considerable doubt exists as to the extent to which he may insure. He has an undoubted interest to the extent of the mortgage debt He has also a right to insure the mortgaged property to its full value for his own benefit and for the benefit of other persons interested, and, it is submitted, he may effect this insurance in his own name (pp. 54–57).

A mortgagor has an insurable interest in the full value of the property insured, even though it be mortgaged to its full value, because in case of loss he would not only be deprived of the property, but would also remain liable for the mortgage debt (p. 57).

In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss (pp. 57–59).

Chapter III.—The Duration of the Risk Covered by the Policy.

In the preceding chapter it has been seen that an ordinary policy on freight has always been regarded as a contract of indemnity during the adventure in which the freight was to be earned. From the time that the freight began to be earned, an inchoate right to it was said to arise, and from this time, according to the American view, there was an inception of an insurable interest in the freight, and according to the view adopted in several early English cases, there was an inception of the risk (p. 60).

It is, however, misleading to treat the inchoate right as referring either to the inception of an insurable interest in the freight, or to the inception of the risk under the policy. The ordinary policy on freight is not intended to cover any freight which the assured may have engaged. In the absence of indication to the contrary, it is an insurance of the freight which is being earned. Until

something has been done towards earning the freight, the policy does not attach, and it does not attach because until then the freight does not come within the scope of the policy (p. 60).

At different times different tests have been suggested as to time when in the case of chartered freight the policy attaches. According to one view, the policy did not attach until the vessel had broken ground on the voyage. According to another view, it did not attach until the vessel was ready to take the cargo on board. According to some early decisions the test was whether something had been done under the contract of affreightment. These various tests should be regarded merely as criteria for the purpose of deciding whether the freight has in fact begun to be earned, and not as artificial limitations upon the commencement of the risk. Provided that the assured has freight which comes within the scope of the policy, the risk can attach at once, and is not subject to any implied condition that something must have been done under the contract of affreightment, or that the vessel must be ready to load, or have broken ground on the voyage (pp. 60, 61).

The Marine Insurance Act, therefore, provides that "Where chartered freight is insured at and from a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety" (p. 60).

In policies on chartered freight, as in all other policies, the commencement of the risk may be made to depend upon a certain event, and in such cases the risk does not attach until the happening of the event. For instance, many policies contain a clause to the effect that the risk on freight is not to commence until the goods, in respect of which the freight is payable, are loaded on board the ship (pp. 61–64).

If the provisions of such a clause have no application to the facts, the clause should, it is submitted, be ignored (pp. 64, 65).

Different rules with regard to the inception of the risk apply in the case of ordinary freight, that is to say, freight payable merely for the carriage of particular goods. According to the Marine Insurance Act, where freight, other than chartered freight, is payable without special conditions, and is insured at and from a particular

place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo" (pp. 65, 66).

The rule, that in the case of freight payable for the carriage of goods the risk only attaches as the goods are put on board, may be traced to the fact that in the majority of cases no right to any freight exists until the goods are put on board. But in an early case it was decided that in the case of freight to be derived by the shipowner from the carriage of his own goods, the policy attached as soon as the carriage was substantially ready to begin, that is to say, as soon as the cargo was in readiness, and the ship was ready to receive it. The Act accordingly contains a proviso to this effect, and provides that the same rule shall apply to freight to be derived from the carriage of the goods of others. It must, however, be freight, and not a mere expectation of obtaining freight; it must be freight to be derived from the carriage of goods, which some person has contracted to ship (pp. 66, 67).

The Act speaks of the goods "being in readiness" and the ship "ready to receive them." The cargo must be in readiness, but this does not necessarily mean that the cargo must be on the quay at which the ship is to be loaded, although this will generally be the case. If the goods are usually stored at a place at a distance from the spot at which the loading is done, it will suffice if the cargo is in readiness at that place (p. 67).

The ship must be "ready to receive" the cargo, but this does not necessarily mean that the vessel must be at the berth where the cargo is to be loaded. These words refer to the condition of the ship (pp. 67, 68).

With regard to the termination of the risk on freight, the rule generally laid down is that the risk terminates at the same time as the risk terminates under an ordinary policy on goods. If the *locus ad quem* referred to in the policy is not the place of discharge of the cargo, the risk under an ordinary policy on freight probably terminates when the ship has safely arrived at the agreed port of destination and is at her moorings (p. 68).

The policy does not attach if the vessel was not seaworthy at the commencement of the voyage, or if the vessel sails on a voyage different from the voyage insured (p. 69).

Freight may be insured by a time policy, but this, it is submitted, does not affect the view that the freight intended to be covered is the freight which the shipowner is in the course of earning.

It is not necessary that the policy should cover the whole period during which the freight may be at risk, and a loss of freight caused by perils insured against during the period covered by the policy may be recovered, although the loss is not ascertained until the period covered by the policy has expired (pp. 69–71).

An assured cannot, however, recover for a loss which, although attributable to damage inflicted by perils insured against during the period covered by the policy, is not sustained until after the period covered by the policy has expired (pp. 71, 72).

Chapter IV.—The Designation of the Subject-Matter in the Policy.

In every policy the subject-matter must be designated with reasonable certainty, but it is sufficient if this is done in general terms. Originally insurances used to be effected on freight *eo nomine*, but nowadays it is more usual to describe the subject-matter at greater length and in greater detail (pp. 73, 74).

The designation freight covers the freight payable under a bill of lading, charterparty, or other contract of affreightment, the benefit derivable by a shipowner from carrying his own goods, and advance freight. It does not include passage money, or under ordinary circumstances the remuneration payable for the carriage of live animals or of goods on deck (p. 73).

It is not necessary to state the nature and extent of the interest of the assured in the subject-matter insured. In early times the view was entertained that no one but the owner of a vessel could insure freight *eo nomine* without disclosing the nature of his interest, but this view, it is submitted, is not correct (pp. 74–77).

The extent to which an assured, who has a limited interest in property, may insure is not necessarily limited to the amount of his own limited interest. Thus a mortgagee, a carrier, or other person with a limited interest in property, may insure on behalf and for the benefit of other persons interested as well as for his own benefit, and may recover the full value of the property insured, provided that he intended the policy to cover not only his own personal interest, but the interest of all those who were interested in the property. In such cases the policy should, it is submitted, be construed as applying to the interest intended by the assured to be covered (pp. 77–82).

If the assured intended the policy to apply to his personal interest in one capacity, and it happens that he is interested in some other capacity, it is not clear whether the policy should be construed as applying only to that particular interest which theassured intended to insure. It is submitted that where the policy designates the subject-matter insured in general terms, it should be construed as covering all the personal interests of the assured which he has at risk (pp. 82–84).

Where the policy is in general terms, it must not be construed in the absence of intention or indication to the contrary, as covering the interest of the assured in a portion only of the subject-matter which is within its terms and which he has at risk. This rule may be of considerable importance in the case of insurances on freight. A ship-owner may have made a charterparty under which the vessel is to proceed from A to B, and there load a cargo to be carried to C. During the voyage from A to B he may be in the course of earning this freight, and he may also be carrying a cargo in respect of which freight will be payable. He will thus have two freights at risk, both of which would be covered by a policy on freight at and from A to B. In such cases the policy should, it is submitted, in the absence of intention or indication to the contrary, be construed as an insurance of the freight payable in respect of the earlier voyage (pp. 84–88).

Where the voyage insured consists of successive stages during which the assured has at risk successive freights, the policy should, in the absence of intention or indication to the contrary, be construed as an insurance of the freight pending during each successive passage (pp. 88–91).

Where a policy has been effected on freight, and a cargo is loaded on board a vessel, it is to the freight of that particular cargo that the policy attaches. Similarly, where a charterparty has been made under which freight will be payable, the policy attaches to the freight of that particular charterparty. A loss of such freight by a peril insured against will *prima facie* constitute a total loss under the policy. If the assured treats the loss as a constructive total loss, the underwriter on freight will be entitled to the benefit of any freight which is earned or which might have been earned in the course of the voyage insured. If the loss is not an actual total loss, and the assured does not treat the loss as a constructive total loss, he will only be entitled to recover the difference between the original freight and the freight which has been or which might have been earned in the course of the voyage insured (pp. 91–96).

If after the policy has attached to the freight payable in respect of a particular cargo, that cargo is voluntarily unladen, and a different cargo substituted for it, or if after the policy has attached to the freight payable under a particular charterparty, that charterparty is voluntarily cancelled and other freight obtained in place of it, the policy will, it would seem, attach to this substituted freight. This result certainly follows if the terms of the policy are such as to show that it was not intended to apply merely to the original freight. Such an intention is inferred if the policy contained a clause giving leave to discharge and take in cargo, or if the voyage insured is a trading voyage or consists of a series of stages (pp. 96, 97).

The foregoing remarks have had reference to policies on "freight" *eo nomine*. Nowadays it is more usual to describe the subject-matter at greater length and in greater detail (p. 97).

An expression frequently used is freight "on board or not on board." These words were probably framed in order to exclude the printed clause found in many policies, "beginning the adventure upon the said goods or freight from the loading thereof on board the said ship." They are now frequently found in policies which do not contain the printed clause (pp. 97–99).

Another expression is freight "chartered or as if chartered." These words do not cover a mere expectation of freight. Their

object may be to provide that the principles applicable to chartered freight shall be applied also to other freight as if it were chartered freight (pp. 99–101).

It has been suggested that the expression chartered freight may only apply to freight payable under a charterparty which is in existence at the time when the insurance is effected, but there seems to be no sound reason why such a narrow construction should be adopted. These words would be an indication to the underwriter that a charterparty may be in existence (p. 101).

It is not necessary for the assured to disclose the fact that a charter-party is in existence, but he must not conceal the fact that the charterparty is in an unusual form (pp. 102–104).

Chapter V.—Losses under the Policy.

Freight is the benefit derivable from the employment of a vessel, and where a vessel is being employed in carrying a cargo in respect of which freight is payable, it is the freight of that cargo, in that vessel, and on that voyage which is the subject-matter of the insurance and to which the policy attaches. Under ordinary circumstances a loss of both the vessel and the cargo will involve a loss of the freight, unless the freight is payable irrespective of what may happen to the ship and cargo, and, if in such a case the shipowner is prevented from earning the freight by any of the perils insured against, he will be entitled to recover a total loss under the policy (p. 105).

If the vessel is totally lost or damaged to such an extent as not to be worth repairing, and is not repaired, there may be an actual total loss of the freight, but this result does not necessarily follow, as the shipowner may be able to earn the freight by transhipping the cargo to the place of destination, and the freight thus earned is regarded as the original freight (pp. 105–107).

Although the shipowner as between himself and the freighter may not be bound, *qua* shipowner, to tranship or forward the goods to their destination, he has undoubtedly the right to do so. This right, if there is a chance of using it so as to prevent a total loss of

freight, the assured must, as between himself and the underwriters on freight, either exercise himself or by a timely abandonment enable the insurer, if he choose, to exercise it for his own benefit (p. 107).

The position, however, may be such that there is no chance of an opportunity of the cargo being forwarded to its destination, and in such cases there is an actual total loss of freight unless the freighter accept delivery of the cargo at the intermediate port under such circumstances as to render himself liable for freight or for a *pro rata* freight (pp. 107–109).

In considering the question whether the cargo can be forwarded or not, regard must be had to the circumstances existing at the time, and to the interval which would have to elapse before a substituted vessel could be obtained. If there is no chance of an opportunity of the cargo being forwarded within a reasonable time, the assured would, it is submitted, be entitled to recover for a total loss (pp. 109, 110).

There is also, it would seem, an actual total loss of freight, if there is no chance of an opportunity of the cargo being transhipped and forwarded except at a cost equal to or exceeding the original freight (pp. 110, 111).

If the vessel is totally lost or damaged to such an extent as not to be worth repairing and is not repaired, but the cargo can be transhipped and forwarded to its destination at a reasonable expense and within a reasonable time, there is not an actual loss of the freight, but the shipowner may, by giving due notice of abandonment, entitle himself to claim as for a total loss (pp. 111–113).

The total or constructive total loss of a vessel may, therefore, be treated by the shipowner as involving a constructive total loss of the freight. He may give due notice of abandonment, and if the abandonment is accepted or an action commenced, he may, if the loss was caused by perils insured against, recover as for a total loss (p. 114).

If the notice of abandonment is not accepted and an action is not commenced until freight has been or could have been earned by transhipping and forwarding the cargo to its destination, the position is obscure. It is submitted that in such a case the assured cannot recover for a loss of freight, but if he has transhipped the cargo, he

may recover under the suing and labouring clause the reasonable expenses which he has incurred (pp. 114–117).

If notice of abandonment has been given, and the assured, while still persisting in the abandonment, endeavours to earn the freight by transhipping the cargo, but is unable to do so by reason of perils which are not covered by the policy, he will, it is submitted, nevertheless be entitled to recover for a total loss of freight (p. 117).

If notice of abandonment is not given and the freight can be earned by transhipping the cargo and forwarding it to its destination, the assured must adopt this course. If the cargo is transhipped and the freight earned, there will be no loss of freight, but the assured will be entitled to recover the reasonable costs of transhipment under the suing and labouring clause. If the goods are not transhipped, and the freight, which might have been so earned, is lost, the assured will not be entitled to recover for the loss which is to be attributed to his neglect (pp. 118, 119).

If at the time of the casualty it is doubtful whether the cargo can be transhipped, the assured should in order to make certain his right to treat the loss of freight as a total loss, give due notice of abandonment to the underwriters on freight. If, however, it subsequently appears that the cargo cannot reasonably be forwarded, the assured will, it is submitted, be entitled to recover for a total loss, although no notice of abandonment has been given (pp. 119, 120).

In the preceding remarks, when reference has been made to a vessel being damaged to such an extent as not to be worth repairing, it has been assumed that the vessel has not been repaired, and has remained a wreck. It may happen, however, that the vessel is repaired either by the owner or by the underwriter to whom she has been abandoned or by the purchaser to whom she has been sold (p. 120).

If the vessel is repaired by the owner and completes the voyage and earns the freight, then inasmuch as the freight has been earned by the assured, there is under ordinary circumstances no loss of freight (pp. 120–122).

If the vessel is repaired by the underwriters to whom the vessel has been justifiably abandoned, or by a purchaser to whom she has

been justifiably sold, and subsequently completes the voyage and earns freight, the right of the assured to recover for a total loss of freight is not defeated by the fact that freight has been earned by the vessel while out of his control (pp. 122–133).

The right to recover for a total loss is not defeated, if the underwriters, to whom the freight has been abandoned, earn the freight by forwarding the cargo to its destination at a cost equal to or exceeding the original freight (p. 131).

The foregoing remarks have applied to cases where the vessel has been lost or damaged to such an extent as not to be worth repairing.

If the vessel can be repaired at a reasonable cost so as to carry on the cargo within a reasonable time to the port of destination and thus earn the freight, the shipowner is entitled to retain possession of the cargo for the purpose of completing the voyage, and if he fails to do so and thereby loses the freight, he cannot hold the underwriter liable, as the freight in such case would be lost by his default, and not by any of the perils insured against (pp. 134, 135).

This right of the shipowner to retain the cargo while repairs are being effected, and his obligation to do so, are governed by the considerations whether the repairs can be effected so as to carry on the cargo to the port of destination within a reasonable time and at a reasonable cost. As to what constitutes a reasonable time, no definite period can be prescribed; the circumstances of each case, the nature of the trade, and the voyage upon which the vessel is engaged must be considered (pp. 135, 136).

If, whatever the extent of the delay may be, the cargo be of a perishable nature, or so damaged as to become perishable, and would in all probability perish before the repairs can be effected or the voyage completed, the shipowner loses his right to retain it, and if in such case the damage was due to any of the perils insured against, the assured will be entitled to recover for the resulting loss of freight (pp. 137, 138).

If the cargo can be reshipped so as to arrive in specie, although so damaged as to be of little value, the shipowner is under ordinary circumstances entitled to retain it, and if, instead of so doing, he redelivers it to the freighter, he cannot claim from the underwriters

on freight for a loss which was caused, not by any of the perils insured against, but by his own voluntary action (pp. 138–143).

The question to be determined is whether the cargo can be carried on so as to arrive in specie; and the individual interest of the cargo-owner, and the object which he had in view when making the shipment, is not an element to be considered (pp. 143, 144).

If the repairs to the ship cannot be effected so as to carry on the cargo to the port of destination within a reasonable time, then, subject to the shipowner's right to tranship for the purpose of earning the freight, the contract of affreightment is dissolved, and if there is no chance of an opportunity of the cargo being forwarded except, perhaps, at a cost which would be equal to or would exceed the amount of the original freight, and if there is no chance of obtaining a substituted cargo on the insured voyage, there is an actual total loss of freight and the assured need not give notice of abandonment (p. 144).

At the time of the accident it may be difficult to decide whether the repairs can be effected so as to carry on the cargo within a reasonable time. If there is no reasonable prospect of the cargo being so carried on, the parties are not bound to wait for an indefinite period to see if any change occurs. If there is a prospect of the cargo being so carried on and of the freight being earned, the shipowner must continue the voyage, but if the expectation ultimately proves to have been erroneous and the freight cannot be earned, then provided that the loss was due to any of the perils insured against, the assured will be entitled to recover for a partial loss if the loss be partial, or for a total loss if the loss be total (p. 145).

If the delay is not so great as to break up the voyage, but merely suspends it, the shipowner cannot recover under an ordinary policy for the increased cost of wages and provisions caused by the delay, or for the loss of profit due to the prolongation of the voyage (pp. 145–147).

The other element to be considered in deciding whether a vessel, which has been damaged, should be repaired or not, is whether the damage to the vessel can be repaired so as to carry on the cargo to the port of destination at a reasonable cost. A shipowner is not bound to repair the vessel if, in a business sense of the word, it is

not possible to do so, and the vessel may be considered as being irreparable, if the cost of the repairs would exceed the value of the vessel when repaired (pp. 147–149).

The repairs, the costs of which are to be considered, do not mean a reconstruction, but the vessel is to be repaired so as to be not merely seaworthy, but, as far as repairs can effect it, a vessel of the same classification and as nearly as possible the same thing as she was before. In considering whether the cost of repairs will exceed the value of the vessel when repaired, the better view, it is submitted, is not to include in the value of the vessel the freight which will be earned by completing the voyage (pp. 149–153).

Where, owing to the cost of repairs the vessel is treated as a constructive total loss, and there is no chance of an opportunity of the cargo being forwarded within a reasonable time and at a cost less than the amount of the original freight, there is a total loss of freight, and notice of abandonment is not required (p. 153).

If, owing to an embargo or capture rendering the completion of the adventure impossible or unlikely, the contract of affreightment is treated as at an end, the shipowner will lose his freight. In such a case he will be entitled to recover from the underwriter on freight under a policy in the ordinary form, but as the vessel may be recaptured or released and may earn freight on the insured voyage, the assured should give notice of abandonment. He is then, so long as the loss continues apparently total, in a position to bring an action against the underwriters on freight, and if an action is commenced before any change in the situation occurs, he will be able to recover as for a total loss (pp. 154–156).

If no action is commenced, and the ship being recaptured or released comes again under the control of the assured and performs the voyage and earns freight, the assured will not be entitled to treat the loss, which has ceased to be total, as a total loss (pp. 156 157).

The position as between the shipowner and the underwriters on freight is usually complicated by the fact that the ship will have been insured and may have been abandoned to the underwriters on ship, who thereby become entitled to any freight subsequently earned by the ship (p. 157).

If, by reason of capture or some similar cause, the ship is abandoned to the underwriters on ship under circumstances which justify the shipowner in treating the ship as a constructive total loss, and in putting an end to the contract of affreightment, and the freight is thereby lost, the assured will, it is submitted, be entitled to recover for this loss from the underwriter on freight, the loss in such case being due to a peril insured against and not to the abandonment of the ship to the underwriters on ship. And, it is submitted, the assured will be entitled to recover although the contract of affreightment is not by any definite act of the parties to it treated as at an end (pp. 158–160).

The actual loss of the cargo usually causes a total loss of the freight payable in respect of it, and a loss of that freight by any of the perils insured against will occasion an actual total loss of freight unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured (p. 160).

Such freight is in the nature of salvage, and the shipowner is entitled to any expenses incurred for the express purpose of obtaining it. Freight so earned has the effect of reducing the shipowner's loss on the voyage, and after it has been received, he will only be able to recover as for a partial loss. If he wishes to recover for a total loss, he must, while the loss is still total, give due notice of abandonment and commence an action against the underwriter on freight (pp. 160–162).

If the shipowner can complete the voyage and earn freight in the course of it, but neglects to do so, the underwriters on freight will not be prejudiced by his failure to adopt this course (pp. 162, 163).

If the cargo is not wholly destroyed, but is so much damaged by perils insured against that it cannot be carried on without endangering the health or lives of the crew or the safety of the ship, the shipowner may jettison or abandon it, and this constitutes a total loss of the freight payable in respect of it (p. 163).

If the cargo is damaged to such an extent that it cannot be carried to the port of destination so as to arrive in specie, the shipowner loses his right to retain it, and if the damage to the goods was

due to any of the perils covered by the policy, the assured can recover for the resulting loss of freight (p. 163).

If the cargo, although greatly damaged, can be reconditioned at a reasonable expense, so as to be capable of being carried in specie to the port of destination within a reasonable time, the shipowner may retain it, and if he fails to do so, and thereby loses the freight, he cannot claim from the underwriters for a loss which was caused, not by any of the perils insured against, but by his own voluntary action (p. 163).

In determining whether cargo can be reconditioned so as to be capable of being carried to its destination in specie, two questions have to be considered, the question of expense and the question of time (p. 163).

With regard to the question of expense, if the cost of reconditioning the cargo would exceed the value of the cargo on arrival at the port of destination, the cargo is from a commercial point of view irreparable and need not be repaired. The cost of reconditioning includes the cost of putting the cargo as nearly as possible into the same condition as it was before the accident, so far as repairs can bring this about. The freight which will be payable for the goods should not, it is submitted, be taken into account (pp. 163–165).

With regard to the question of time, the circumstances existing in each case must be considered. If the cargo can be reconditioned in such a time as, taking everything into consideration, is consistent with the purposes of the contract of affreightment and the character and objects of the adventure, the shipowner must be prepared to wait and forward the cargo in his vessel as soon as it is in a condition to be reshipped, and if he voluntarily arranges with the shipper to cancel the contract and relinquish the voyage, he cannot hold the underwriter liable for the resulting loss of freight (pp. 166–169).

If the cargo cannot be reconditioned in time to be reshipped by the original vessel, the shipowner cannot, it is submitted, retain it in order to earn his freight by carrying it in another vessel, and if in such a case the damage was due to perils insured against, and there is no chance of obtaining a substituted cargo, the shipowner will be entitled to recover for the loss of freight thus caused and need not give notice of abandonment (pp. 169, 170).

The foregoing remarks have dealt with the principles applicable to freight payable in respect of particular goods and dependent upon their carriage. The freight, however, may be independent of considerations affecting the cargo, as in the case of chartered freight before the goods are put on board, and, under certain circumstances, in the case of lump-sum freight (p. 170).

In the case of chartered freight before the goods are put on board, the loss can occur solely by reason of damage to the ship. A total loss of the ship by perils insured against will involve a total loss of the freight under the policy, and the same result will follow if the vessel, although not totally lost, is damaged to such an extent that she cannot be repaired except at a cost exceeding her value when repaired, or after a delay which would frustrate the adventure contemplated by the contract of affreightment (pp. 170–172).

It may be that, although the vessel can within a reasonable time and at a reasonable cost be repaired so as to make the insured voyage, she cannot be repaired so as to bring home any of the cargo for which she was chartered. In such a case there is *primâ facie* a total loss of freight, but the loss is not necessarily total, as the assured may be able to earn other freight on the voyage insured. If, however, the assured gives due notice of abandonment, and the notice is accepted or an action commenced, he will be entitled to recover as for a total loss. If the abandonment is not accepted and an action is not commenced, then the right of the assured to recover, and the extent to which he may recover, will depend upon whether other freight has been earned or could have been earned on the voyage insured, and upon the amount of such other freight (pp. 172, 173).

If the vessel cannot be repaired so as to carry the whole of the contemplated cargo, but can be repaired so as to carry a portion, and the circumstances are not such as to entitle the assured to treat the vessel as a total loss, there will, it would seem, be only a partial loss of freight (p. 173).

Lump-sum freights are found, broadly speaking, in two different kinds of contract of affreightment. Under the one kind of contract the shipowner charters his vessel for a specific voyage and agrees to place at the disposal of the charterer the full carrying capacity of

the vessel, and to carry the cargo which may be provided by the charterer, and in return he stipulates for a lump-sum freight, which is usually made payable upon the right and true delivery of the cargo. Under the other kind of contract the shipowner charters his vessel for a certain period of time, and while his obligations may be the same as under the former kind of contract, the payment of the freight is not made to depend upon the delivery of the cargo, but is made payable at a certain rate for the time during which the vessel is actually on hire. Under both kinds of contracts the rights of the shipowner to the freight depend upon the particular terms of the contract of affreightment, and it is, therefore, difficult to lay down any general propositions as to what constitutes a loss of such freight (p. 173).

Under the first kind of contract where the freight is made payable upon the right and true delivery of the cargo, these words are not taken literally. The whole lump freight is payable although a portion of the cargo is lost by excepted perils without any default on the part of the shipowner, and it may perhaps also be payable although the non-delivery is wrongful and is due to causes not excepted by the contract of affreightment. If no cargo is delivered, then probably no freight is payable, but if the original vessel is lost, the shipowner may still earn the freight by making delivery in a substituted vessel or in some other way, unless the payment of the freight is made to depend upon the arrival of the original vessel. With regard, therefore, to lump-sum freight payable under the first kind of contract, although the right to such freight may be affected by accidents to the cargo, it will more usually be affected by accidents to the vessel (pp. 173, 174).

With regard to lump-sum freight payable under the second kind of contracts, that is to say, lump-sum freight payable in respect of the time during which the vessel is on hire, it is not easy to see how under ordinary circumstances, the right to such freight can be affected by accidents to the cargo which may be on board the vessel, and in the absence of provision to the contrary, the right to such freight is not under ordinary circumstances affected by accidents which temporarily affect the efficiency of the ship. Most contracts of affreightment, however, which stipulate for freight of this

character, contain a provision to the effect that, if the efficient working of the vessel is prevented for more than twenty-four hours, the payment of freight is to cease until the vessel again becomes efficient (p. 174).

If the effect of such a clause is that the freight ceases automatically to be payable, the assured who has effected an insurance on this freight will be entitled to recover for the loss of freight thus caused, provided that the clause was brought into operation by reason of perils covered by the policy (pp. 174–178).

If the effect of the clause is that the freight does not cease automatically to be payable, as for instance in the case of a cancellation clause, and between the peril and the loss there intervenes some act of volition or election on the part either of the shipowner or the charterer to which the loss may be said to be more proximately due, the loss should usually be attributed not to the peril but to such act of volition or election. There may, however, be cases in which the loss can be attributed to the peril (pp. 178–181).

In order to exclude liability for loss of freight sustained under a cancellation clause or under a clause suspending the payment of hire, while a vessel is laid up, clauses are frequently inserted in the policy to the effect that "no claim arising from the cancellation of any charter" shall be allowed, or that the policy is "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The latter clause will also free the underwriters from liability to pay for a loss of freight under a contract of affreightment which has been abandoned owing to delay frustrating the object of the adventure thereby contemplated (pp. 181–184).

With regard to a partial loss of freight, while there may be a total loss of part of the freight insured, there cannot, it is submitted, be a partial loss of the whole freight except in the case where after the loss of the original cargo, some freight is earned by carrying other cargo on the voyage insured (pp. 184, 185).

According to the memorandum contained in the ordinary policy, freight is warranted "free from average under three pounds per cent., unless general or the ship be stranded." For the purpose of estimating the percentage of damage the aggregate value of the whole freight at

risk should be considered, unless the policy contains any provision or indication that the freight upon the different parts of the cargo is to be treated separately (pp. 185, 186).

In adjusting such losses the practice has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject (p. 186).

Freight may also be subject to losses in general average, and such losses, if attributable to perils insured against, are recoverable from the underwriter under the ordinary form of policy. Such losses may be due either to general average sacrifices or to the liability to contribute in general average (p. 186).

If goods are jettisoned for the general safety and the freight payable in respect of them is thereby lost, the freight so lost is a general average loss. Similarly, if cargo, in respect of which freight would be payable, is sold at a port of distress for the purpose of procuring funds to defray general average expenses, or if cargo is destroyed by water used to extinguish a fire (pp. 186, 187).

If a vessel be stranded or lost under circumstances which give rise to a claim in general average, and the freight, which the vessel would have earned, is thereby lost, the freight so lost is regarded as a general average sacrifice (pp. 187, 188).

If, however, the freight is lost in consequence of the voyage being abandoned, and the proximate cause of the abandonment of the voyage is not the general average act, but the peril which gave rise to the general average act, the loss of freight is not to be treated as a general average sacrifice (pp. 188, 189).

The amount to be made good in general average will vary according to the circumstances. Where part of the cargo has been jettisoned, but the vessel ultimately completes the voyage, the shipowner's loss is of the whole unpaid freight on those goods, less the costs which he would have incurred if those goods had completed the voyage, that is the cost of landing and delivering the goods. The expenses of the vessel in completing the voyage have not been avoided, and no part of them should be deducted. If, after the jettison of a part of the cargo, the ship is wrecked, or condemned at a port of refuge, and

the balance of the cargo is forwarded to its destination in another vessel, the costs of forwarding, which would have been incurred but for the jettison, must be deducted from the amount to be allowed in general average in respect of the freight which has been lost (pp. 189, 190).

If the costs of transhipment are equal to or exceed the original freight, nothing is allowable in general average; similarly, nothing is allowable if after the jettison, the vessel and the cargo remaining on board are totally lost (p. 190).

If after a jettison, the ship puts into a port of refuge, and there takes in fresh cargo in the space left vacant through the jettison, the new freight thus earned less the extra expenses incurred in obtaining and earning it, must go in diminution of the shipowner's claim for loss of freight. It would be otherwise if the ship were not full at first, so that the new cargo might equally have been received on board had there been no jettison (p. 190).

With regard to the contributory value of freight payable for the carriage of goods under a charterparty or bill of lading, it is the gross amount of the freight earned, minus those expenses of earning it which would have been avoided if no general average act had taken place and the ship had been lost. From the freight received must be deducted the cost of discharging the cargo and of collection. It is also the practice to deduct the wages of the crew since the general average act, and port charges incurred subsequently to it, until all the cargo has been discharged. The value of provisions and coals laid in before the general average act is not deducted. The cost of provisions and coals laid in after the general average act and consumed before the end of the voyage should, it is submitted, be treated as part of the expenses of earning the freight, but there is no settled practice on this point (pp. 190, 191).

Where the freight to be considered is chartered freight payable for the use of a vessel, and the chartered voyage is one entire voyage and the chartered freight is the only freight, the whole chartered freight which is at risk and which the vessel is earning at the time of the general average act should be taken into account both for purposes of making and receiving contributions in general average, whether the vessel is in ballast or has goods on board (pp. 191–193).

If the chartered voyage is not one entire voyage, but consists of separate voyages in respect of each of which separate freights are payable, only the freight payable in respect of the voyage which the vessel is making at the time of the general average act should, it would seem, be taken into account (p. 193).

If the chartered freight is not the only freight, as for instance in those cases where a vessel has been chartered at one rate of freight, and is used by the charterer to carry goods under bills of lading which reserve a different rate, the practice is to regard only the bill of lading freight, and to disregard the charterparty freight (p. 193).

If the bill of lading freight is less than the charterparty freight, it is only this lower rate of freight which is allowed in general average, and upon which contribution is to be made. If the bill of lading freight is greater than the charterparty freight, it is only the bill of lading freight which is considered, but as it would be unfair that the shipowner should contribute or be paid on the higher rate of freight, the charterer is liable to contribute on the excess between the charterparty and the bill of lading rate of freight, and is entitled to any allowance made in respect of the excess (pp. 193–195).

If the charterparty provides for the carriage of goods on a homeward voyage and contemplates that the shipowner will on the outward voyage be carrying goods for other persons, in the event of a general average act during the outward voyage, it is only the freight payable in respect of the outward cargo which should be taken into account (p. 195).

If the vessel has been chartered under distinct charterparties for other voyages after the one which she is making, the correct principle, it is submitted, is to take into account only the freight payable in respect of the voyage which the vessel is making at the time of the general average act (pp. 195, 196).

Where freight payable for the carriage of goods has been paid in advance or is unconditionally payable at a certain time, whether the goods arrive or not, the obligation to make and the right to receive general average contribution in respect of such freight is transferred from the owner of the ship to the owner of the goods (pp. 196, 197).

Where the freight paid in advance is chartered freight payable for the use of a vessel irrespective of the cargo which may be put on board, the obligation to make and the right to receive general average contribution is transferred to the party who has paid the freight, that is, to the charterer (p. 197).

Where expenses of reloading are incurred at a port of refuge in consequence of accidental damage to the vessel, the practice is to charge these expenses to the party who runs the risk of freight, that is, wholly to the charterer, if the whole freight has been prepaid, or if part only, then in the proportion which the part prepaid bears to the whole freight. This practice has been the subject of much adverse criticism, and is, it is submitted, unsound (pp. 197, 198).

Chapter VI.—Adjustment. Valuation. Abandonment. Subrogation.

In an insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance, and no account is taken of the costs and expenses which have to be incurred in order to earn the freight (pp. 200, 201).

In the event of a total loss of all the freight covered and intended to be covered by the policy, the assured, in the absence of any provision to the contrary, will be entitled to recover the full amount insured, provided that this does not exceed the gross amount of the freight at risk under the policy plus the charges of insurance, and he will also be entitled to recover in a proper case under the sue and labour clause any expenses reasonably incurred in endeavouring to avert the loss (pp. 201, 202).

It may be that at the time of the loss only a portion of the cargo, which it was contemplated would be loaded and in respect of which freight would be payable, has been put on board, or it may be that at the time of the loss a portion of the cargo has been safely landed and the freight payable in respect of it withdrawn from the risk (p. 202).

If the policy was intended to cover the freight of a definite cargo,

the assured will only be entitled to recover the proportion of the sum insured that the freight of the goods lost bears to the whole freight which would have been earned had the whole intended cargo been loaded and all arrived (p. 202).

In the case of an open policy, however, it will seldom happen that the policy was intended to apply to any particular cargo, and the correct rule for adjusting losses under an open policy on freight is under ordinary circumstances to ascertain the proportion which the freight lost bears to the whole freight which has been at risk under the policy, and the proper time to ascertain the freight, which has been at risk under the policy is at the expiration of the risk (pp. 202, 203).

The same rule applies in those cases where at the time of the loss part of the freight, which has been at risk and covered by the policy, has been earned and withdrawn from the risk (pp. 203, 204).

Valued policies are policies which specify the agreed value of the subject-matter insured. The value fixed by the policy is conclusive of the insurable value of the subject intended to be insured. It has been laid down that a valuation of freight refers *primâ facie* to the freight of a full cargo, or the charter of the entire ship, but it is doubtful whether this applies except in those cases where it is expected that the vessel will load a full cargo, and the vessel is lost before the loading is completed and before it can be determined whether a full cargo will ultimately be loaded or not (pp. 204–206).

If, however, the vessel cannot obtain a full cargo and sails with all the cargo which she can obtain, then, unless it appears that the subject insured was in fact intended to be the freight of a full cargo, the valuation should, it is submitted, be applied to the freight of the cargo so obtained (p. 206).

In America it has been held that in the case of a valued time policy on freight, the valuation should be construed as applying to that freight only which the assured may have at risk (p. 207).

If the valuation was intended to refer to the freight of a full cargo, it must be so applied, and in every case in which it appears that the valuation was intended to refer to any particular subject, it should be so construed (pp. 207–209).

A valuation refers to the subject intended to be insured, and not to the interest of the assured in that subject (pp. 209–211).

The principles to be applied in adjusting losses in the case of valued policies are the same as in the case of open policies. If at the time of the loss only a portion of the freight, to which the valuation was intended to apply, is at risk, the assured can only recover in respect of the loss of such portion, and he will recover such proportion of the valuation as the freight lost bears to the whole freight intended to be insured. Similarly, if at the time of the loss part of the freight which was at risk, has been earned and withdrawn from the risk (pp. 211, 212).

If it is impossible to ascertain the proportion which the freight lost bears to the whole subject to which the valuation was intended to apply, the policy must be construed as an open policy, but the proportion between the sum insured and the amount of the valuation will determine the proportion of the loss for which the underwriter will be responsible (pp. 212, 213).

The preceding remarks have dealt with the principles of adjustment to be applied in the case of policies which cover a single voyage.

In the case of policies which contemplate that successive freights will be at risk, as for instance in the case of a policy for a succession of voyages or in the case of a time policy, the policy should be treated for the purpose of adjusting a loss incurred during any particular voyage or passage as though it had been a policy for that particular voyage or passage (pp. 213–217).

In the case of policies which contemplate successive voyages in respect of which there may be successive losses, the underwriter is, it is submitted, liable to the extent of the sum insured for losses incurred during such successive voyages even though the aggregate sum which the underwriter may be called upon to pay exceeds the sum mentioned in the policy as being the sum insured (pp. 217, 218).

Where the policy covers the freight of successive voyages, it should be construed, in the absence of intention or indication to the contrary, as covering during each successive voyage only the freight pending in respect of that voyage (pp. 218, 219).

An underwriter to whom freight is abandoned is entitled to all the rights of the assured in that freight. If the assured earns the freight,

he holds it in trust for the underwriter to whom he has abandoned it. If the freight can be earned by transhipping the cargo, the underwriter on freight is entitled to the benefit of that right (p. 220).

The position of the underwriter on freight is usually complicated by the fact that the ship will also have been insured and may have been abandoned to the underwriters on ship, who thereby become entitled to any freight subsequently earned by the ship. In certain cases the underwriter on freight will be entitled to rely on this fact in order to resist a claim for a loss of freight (pp. 220, 221).

Thus he will not be liable if the shipowner loses his freight because he has abandoned the ship to the underwriters on ship under circumstances which did not justify the abandonment. Nor will he be liable, if the shipowner loses the freight after the voyage is completed and the freight is earned, because he has to hand it over to the underwriters on ship, to whom he then elects to abandon the ship by reason of injuries received in the course of the voyage (p. 221).

The position is, however, different if the abandonment to the underwriters on ship is made before the freight is earned, and is justified by the facts (pp. 221, 222).

In practice these difficulties are not likely to arise frequently in the future, as most policies on hull contain the Institute clauses which provide that "in the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." By this clause the underwriters on ship forego their claim to freight pending at the time of the casualty, and this freight passes to the underwriters on freight under the abandonment subject to certain expenses in respect of the cost of earning it (pp. 222, 223).

In order to protect an assured whose claim to recover for a loss of freight might be met by the objection that the loss was due, not to any of the perils insured against, but to his action in abandoning the ship to the underwriters on ship, a provision is sometimes found in policies to the effect that the amount insured on freight shall be paid in the event of the total loss, actual or constructive, of the vessel. If, however, by the terms of the policy on ship, no claim is to be made by the underwriters on ship for freight, so that the shipowner is entitled to any freight which may be earned on the voyage,

he must, if he elects to claim for a loss of freight, give to the underwriters on freight the benefit of the freight so earned (pp. 223, 224).

The doctrine that the abandonee of the ship was entitled to all pending freight ultimately earned by the ship was long a subject of vexed discussion. The Marine Insurance Act provides that "upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it, incurred after the casualty; and where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss" (pp. 224–227).

By subrogation the underwriter on freight, who has paid a loss, is entitled to the benefit of every right and remedy by which the loss has been or can be diminished. Thus, if a vessel is so damaged that she cannot carry the original cargo, but is still able to carry some cargo on the voyage insured, the underwriter will be entitled to any freight which has been or could have been earned in respect of such cargo (p. 227).

If the original cargo is so much damaged that it cannot be carried to its destination, but other cargo can be carried by the vessel on the voyage insured, the underwriter on freight will be entitled to the benefit of the freight which is or might have been received in respect of such substituted cargo (p. 227).

If the cargo is landed under circumstances which give rise to a claim for *pro rata* freight, the underwriter will be entitled to the benefit of such *pro rata* freight, and if the freight was lost under circumstances which give rise to a claim for damages, the underwriter will be entitled to the benefit of such claim (pp. 227–230).

APPENDIX A

MARINE INSURANCE ACT, 1906

[6 Edw. 7, Ch. 41.]

An Act to codify the Law relating to Marine Insurance.

[21st December 1906.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Marine Insurance.

1. *Marine insurance defined.*—A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

2. *Mixed sea and land risks.*—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto ; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

3. *Marine adventure and maritime perils defined.*—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*a*) Any ship or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property" ;

(*b*) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils ;

(*c*) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest.

4. *Avoidance of wagering or gaming contracts.*—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

5. *Insurable interest defined.*—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6. *When interest must attach.*—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7. *Defeasible or contingent interest.*—(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular ,where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have

rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

8. *Partial interest.*—A partial interest of any nature is insurable.

9. *Re-insurance.*—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

10. *Bottomry.*—The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

11. *Master's and seamen's wages.*—The master or any member of the crew of a ship has an insurable interest in respect of his wages.

12 *Advance freight.*—In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

13. *Charges of insurance.*—The assured has an insurable interest in the charges of any insurance which he may effect.

14. *Quantum of interest.*—(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

15. *Assignment of interest.*—Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

Insurable Value.

16. *Measure of insurable value.*—Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows :—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole :

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations.

17. *Insurance is uberrimae fidei.*—A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18. *Disclosure by assured.*—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(*a*) Any circumstance which diminishes the risk;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(*s*) Any circumstance as to which information is waived by the insurer;

(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

19. *Disclosure by agent effecting insurance.*—Subject to the provisions of the preceding section as to circumstances which need not be disclosed,

where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(*b*) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20. *Representations pending negotiation of contract.*—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

21. *When contract is deemed to be concluded.*—A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

The Policy.

22. *Contract must be embodied in policy.*—Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

23. *What policy must specify.*—A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf:

(2) The subject-matter insured and the risk insured against:

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4) The sum or sums insured:

(5) The name or names of the insurers.

24. *Signature of insurer.*—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

25. *Voyage and time policies.*—(1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.

(2) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.

26. *Designation of subject-matter.*—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

27. *Valued policy.*—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

28. *Unvalued policy.*—An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified.

29. *Floating policy by ship or ships.*—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30. *Construction of terms in policy.*—(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31. *Premium to be arranged.*—(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

Double Insurance.

32. *Double insurance.*—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(*a*) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*b*) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(*c*) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(*d*) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

Warranties, &c.

33. *Nature of warranty.*—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. *When breach of warranty excused.*—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. *Express warranties.*—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36. *Warranty of neutrality.*—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

37. *No implied warranty of nationality.*—There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. *Warranty of good safety.*—Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

39. *Warranty of seaworthiness of ship.*—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40. *No implied warranty that goods are seaworthy.*—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

41. *Warranty of legality.*—There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The Voyage.

42. *Implied condition as to commencement of risk.*—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. *Alteration of port of departure.*—Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

44. *Sailing for different destination.*—Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

45. *Change of voyage.*—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

46. *Deviation.*—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47. *Several ports of discharge.*—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

48. *Delay in voyage.*—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

49. *Excuses for deviation or delay.*—(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(*a*) Where authorised by any special term in the policy; or

(*b*) Where caused by circumstances beyond the control of the master and his employer; or

(*c*) Where reasonably necessary in order to comply with an express or implied warranty; or

(*d*) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(*e*) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(*f*) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(*g*) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

Assignment of Policy.

50. *When and how policy is assignable.*—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

51. *Assured who has no interest cannot assign.*—Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

The Premium.

52. *When premium payable.*—Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

53. *Policy effected through broker.*—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

54. *Effect of receipt on policy.*—Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment.

55. *Included and excluded losses.*—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(*b*) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(*c*) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

56. *Partial and total loss.*—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57. *Actual total loss.*—(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual loss no notice of abandonment need be given.

58. *Missing ship.*—Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

59. *Effect of transhipment, &c.*—Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other

moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

60. *Constructive total loss defined.*—(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered ; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired ; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61. *Effect of constructive total loss.*—Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62. *Notice of abandonment.*—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63. *Effect of abandonment.*—(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average and Particular Charges).

64. *Particular average loss.*—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

65. *Salvage charges.*—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

66. *General average loss.*—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

Measure of Indemnity.

67. *Extent of liability of insurer for loss.*—(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

68. *Total loss.*—Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

69. *Partial loss of ship.*—Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows :—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty :

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above :

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

70. *Partial loss of freight.*—Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

71. *Partial loss of goods, merchandise, &c.*—Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows :—

(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy :

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss :

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value :

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand ; provided that, in the case of goods or merchandise customarily sold in bond, the bonded

price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

72. *Apportionment of valuation.*—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

73. *General average contributions and salvage charges.*—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

74. *Liabilities to third parties.*—Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

75. *General provisions as to measure of indemnity.*—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

76. *Particular average warranties.*—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot

recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

77. *Successive losses.*—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

78. *Suing and labouring clause.*—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment.

79. *Right of subrogation.*—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the

interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

80. *Right of contribution.*—(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

81. *Effect of under insurance.*—Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Return of Premium.

82. *Enforcement of return.*—Where the premium, or a proportionate part thereof, is by this Act, declared to be returnable,—

(*a*) If already paid, it may be recovered by the assured from the insurer; and

(*b*) If unpaid, it may be retained by the assured or his agent.

83. *Return by agreement.*—Where the policy contains a stipulation for the return of the premium or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

84. *Return for failure of consideration.*—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(*a*) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable,

provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable.

(*b*) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable

Provided that where the subject-matter has been insured "lost or not lost," and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

(*c*) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(*d*) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(*e*) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;

(*f*) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

Mutual Insurance.

85. *Modification of Act in case of mutual insurance.*—(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

Supplemental.

86. *Ratification by assured.*—Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

87. *Implied obligations varied by agreement or usage.*—(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

88. *Reasonable time, &c., a question of fact.*—Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

89. *Slip as evidence.*—Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

90. *Interpretation of terms.*—In this Act, unless the context or subject-matter otherwise requires,—

"Action" includes counter-claim and set off:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

91. *Savings.*—(1) Nothing in this Act, or in any repeal effected thereby, shall affect—

(*a*) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue;

(*b*) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same;

(*c*) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

92. *Repeals.*—The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule.

93. *Commencement.*—This Act shall come into operation on the first day of January one thousand nine hundred and seven.

94. *Short title.*—This Act may be cited as the Marine Insurance Act, 1906.

SCHEDULES.

FIRST SCHEDULE.

Form of Policy.

Lloyd's S.G. policy.—Be it known that as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause
and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or master thereof, is or shall be named or called ; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety ; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage : they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said

goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

In Witness whereof we, the assurers, have subscribed our names and sums assured in London.

[*Memorandum.*] *N.B.*—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

Rules for Construction of Policy.

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require :—

1. *Lost or not lost.*—Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.

2. *From.*—Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

3. *At and from.*—(*a*) [*Ship.*] Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

(*b*) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(*c*) [*Freight.*]—Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

4. *From the loading thereof.*—Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.

5. *Safely landed.*—Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

6. *Touch and stay.*—In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

7. *Perils of the seas.*—The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

8. *Pirates.*—The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

9. *Thieves.*—The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

10. *Restraint of princes.*—The term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

11. *Barratry.*—The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

12. *All other perils.*—The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

13. *Average unless general.*—The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

14. *Stranded.*—Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

15. *Ship.*—The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

16. *Freight.*—The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

17. *Goods.*—The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2, c. 37.	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon.	The whole Act.
28 Geo. 3, c. 56.	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

APPENDIX B

INSTITUTE VOYAGE CLAUSES, 1915

Freight.

1. Including risk of craft and/or lighter to and from the ship. Each craft and/or lighter to be deemed a separate insurance if desired by the assured.

2. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule 1 ("No"), but in all matters not specifically referred to in York-Antwerp Rules i.–xvii. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

3. Warranted free from particular average under 3 per cent. unless the ship be stranded, sunk, or on fire, underwriters notwithstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

4. In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered.

5. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

6. In calculating the amount due under this policy in respect of any claim except under clauses 2 and 4, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein.

7. Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

8. It is further agreed that should the within-named vessel receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the within-named vessel; but in

such cases the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

9. Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

10. Held covered in case of deviation or change of voyage, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

11. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

12. With leave to dock and undock and go into graving dock.

INSTITUTE TIME CLAUSES, 1915.

Freight.

1. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or crafts in all situations, and to be towed and to go on trial trips.

2. Including risk of craft and/or lighter to and from the ship. Each craft and/or lighter to be deemed a separate insurance if desired by the assured.

3. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule 1 ("No"), but in all matters not specifically referred to in York-Antwerp Rules i.–xvii. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

4. Warranted free from particular average under 3 per cent., unless the ship be stranded, sunk, or on fire, underwriters notwithstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

5. In the event of total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

7. In calculating the amount due under this policy in respect of any claim except under clauses 3 and 5, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein.

8. Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

9. Should the vessel be sold or transferred to new management, then, unless the underwriters agree to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in each of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

10. It is further agreed that should the within-named vessel receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the within-named vessel; but in such cases the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

11. Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

12. Should the vessel at the expiration of this policy be at sea or in distress or at a port of refuge or call, the interest hereby insured shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium to her port of destination.

13. Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

14. To return { per cent. for each uncommenced month if it be mutually agreed to cancel this policy. / per cent. for each consecutive thirty days the vessel may be laid up in port. } and arrival.

Provided always that in no case shall a return be allowed when the within-named vessel is lying in a roadstead or in exposed and unprotected waters.

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